DECISIONS

OF THE

COURT OF SESSION,

From ~~November~~ January 1765 to December 1769.

COLLECTED BY

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ADVOCATES.

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SUMMARIES of the Deciſions in this Volume.

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Page 59. line 9. from the foot, *for* defender *read* purſuer.

Page 107. line 24. *after* chargers *add* they.

Page 116. line 6. *after* fulfilled *add* there being more than two of the termly payments unpaid.

Page 119. line 2. from the foot, *for* did affect to *read* did not affect.

Page 149. line 4. *after* only *add* immediately ſubſequent to the date of.

DECISIONS

OF THE

COURT OF SESSION.

No. I. *January* 16. 1765.

JOHN BUCHANAN of *London*, Merchant;

Againſt

ROBERT JAMIESON Writer to the Signet.

It being unknown, at the judicial ſale of a houſe, that it had been inſured with the Edinburgh company, and a bond granted for the premium, the purchaſer cannot inſiſt that the creditors relieve him of that bond.

SOME houſes in Wardrobe's-court were brought to a judicial ſale by Mr Buchanan, and purchaſed by Mr Jamieſon, without either party knowing that the houſes had been inſured, with the Edinburgh Friendly Inſurance company, at L. 3200 Scots; for $\frac{1}{11}$ of which, as the premium of inſurance, a bond had been granted, which, with ſeven years intereſt on it, remained unpaid.

Mr Jamieſon, upon diſcovering this bond, which, by regiſtration, in terms of the 1ſt act Geo. II. cap. 22. had become a real incumbrance on the ſubjects, inſiſted that the creditors ſhould relieve him, or that he ſhould be allowed to relieve himſelf of it out of the price, as by the decreet of ſale he is veſted with every right which the bankrupt had in his perſon to the ſubject ſold: And it is further declared, that the purchaſers and ſubjects purchaſed, on payment of the prices, 'are freed, diſburdened, and diſ-'charged, of all debts and deeds of the ſaid deceaſed James Wardrop, 'and his authors and predeceſſors, from whom he derived right.'

Anſwered for Mr Buchanan: 'Qui habet commodum, eundem ſequi 'debet et incommodum;' therefore, Mr Jamieſon ought not to have the

 benefit

nenefit of the inſurance without being obliged to pay the premium. The fallacy of his argument lies in ſuppoſing theſe to be ſeparate and unconnected, whereas they are co-relatives, the one being the condition of the other: And, upon a general view, the inſurance muſt be conſidered as an equal bargain between the inſurers and the inſured. Hence, had the Lords known the ſubjects were inſured, and the premium not paid, when they ſet a price on them, that circumſtance would have made no variation. Or, ſuppoſe the premium had been paid up, for the ſame reaſon it would have been added to the price; and, for the ſame reaſon, Mr Jamieſon, had he known of the inſurance, would have offered as much as he did, though the bond was not paid; or, had it been paid, would have given juſt ſo much more purchaſe-money.

Replied for Mr Jamieſon: The benefit of inſurance and payment of the premium are not inſeparably connected. The moment a houſe is inſured, the benefit of inſurance follows the ſubject, and tranſmits to ſingular ſucceſſors: But it is not till the bond is recorded in terms of the ſtatute, that a real lien is created on the ſubject. Should, therefore, the inſurance-company neglect to regiſter ſuch bond properly, the ſubject would be inſured, but not incumbered; ſo that a ſingular ſucceſſor would have the benefit of the inſurance, but the company would have nothing but a perſonal action for the premium againſt the granter of the bond. Suppoſe the proprietor of an eſtate has acquired a right of caſting peats on a neighbouring moſs, or the like, for a ſum of money, for which he had granted heritable ſecurity on his eſtate, the purchaſer, at a judicial ſale of this eſtate, would be undoubtedly entitled to the ſervitude, and yet to have the eſtate diſburdened of the heritable ſecurity. Mr Jamieſon is preciſely in the ſame ſituation. Purchaſers muſt ſatisfy themſelves as to the rental and apparent ſtate of the ſubjects; but they are not obliged to ſearch for incumbrances, againſt which the decreet of ſale is held to be a ſufficient ſecurity.

The Lord Ordinary found Mr Jamieſon ‘ entitled to the benefit of the ‘ inſurance from and after his entry; but that the creditors are en- ‘ titled to any dividends due preceeding that term, and muſt free ‘ and relieve the purchaſer of any annualrents due on the premium ‘ of inſurance preceeding his entry.’

Mr Jamieſon having preſerred a repreſentation againſt this interlocutor, which virtually over-ruled his plea, the Lord Ordinary took the cauſe to report; and ‘ the Lords adhered.’

J. M.

For Jamieſon, *Rae*, *Maclaurin*. Alt. *Jo. Swinton*, jun.

Reporter Lord Juſtice-Clerk. Clerk.

No. II.

No. II. *January* 19. 1765.

Sir *ROBERT GORDON* of *Gordonſtone*, Baronet;

Againſt

JAMES GRANT of *Knockando*; *WILLIAM ANDERSON* and *WILLIAM FORSYTH*, Tenants to *Knockando*; and *ALEXANDER* and *JAMES FINLAY*, Tenants to Sir *Robert*.

Not competent for the court of ſeſſion to make regulations, or enact penalties for preventing muirburn.

SIR Robert Gordon brought a proceſs againſt the ſaid tenants, ſetting forth, that, in May and June 1762, when no muirburn was lawful, they had kindled a muir near a valuable wood of his, on the hill of Molundy, without taking any precaution to prevent the ſpreading of the flames; the conſequence of which was, that the fire reached the dike incloſing his plantation; catched hold of the turf on the top of the dike; ſcorched a number of trees in the outer rows; and would probably have conſumed the whole, had it not been extinguiſhed by a number of people aſſembled by him and others: And therefore, concluding againſt the tenants for payment of damages and expences; and that they ſhould be prohibited from raiſing muirbuirn within ſuch a diſtance of the purſuer's wood as their Lordſhips may think neceſſary for its ſafety, and decreed to obſerve ſuch rules and regulations as the Lords ſhould preſcribe, and under ſuch penalties as they ſhould determine. Knockando was called in this proceſs; but nothing was libelled or concluded againſt him.

The tenants, defenders, all except the Finlays, appeared, and denied the libel. Knockando inſiſted that the proceſs againſt him ſhould be diſmiſſed, with coſts, as nothing was ſo much as alledged againſt him. Sir Robert offered to prove the libel againſt the tenants, and inſiſted Knockando was properly made a party, becauſe of the declaratory concluſions. 'The Lord Ordinary allowed a proof before anſwer.'

Knockando having again contended, in a repreſentation, that the proceſs ſhould be diſmiſſed as to him, the libel was amended, and he concluded againſt, as being equally guilty and liable with his tenants.

From the proof it appeared, that Knockando and his tenants had no hand in the muirburn libelled, but that it had been kindled by his own tenants, the Finlays, againſt whom Sir Robert did not inſiſt; and the queſtion came to be as to the declaratory concluſions.

Pleaded for the defenders: It is both profitable and neceſſary for them to burn the muir of Molundy. Profitable, becauſe it improves the ground; and neceſſary, becauſe it affords them firing, of which they would otherwiſe be deſtitute. No man can uſe his property *in aemulationem vicini*, by erecting works, or doing any thing which yields him no advantage, and

and ſerves only to hurt his neighbour: But, no man can be reſtricted from profitable or neceſſary acts of property, though they may, or even muſt, hurt that of his neighbour, unleſs he be liable to a ſervitude. But, if Sir Robert's demand be well founded, there never will be any occaſion for a ſervitude. Lord Bankton, vol. 1. p. 678.; l. 21. *ff. de aq. et aq. pluv. arc. Zoeſ. ad Pand. lib.* 39. *tit.* 3. § 4. 5. Gaille, *lib.* 2. *Obſ.* 39. And this very caſe is put and determined for the defenders, in *l.* 30. § 3. *ff. ad leg. Aquil.* 'Si quis in ſtipulam ſuam, vel ſpinam, comburendae ejus 'cauſa, ignem immiſerit, ut, ulterius evagatus et progreſſus ignis, alie-'nam ſegetem vel vineam laeſerit; requiramus, num imperitia ejus, aut 'negligentia, id accidit? Nam, ſi die ventoſo id fecit, culpae reus eſt; 'nam et qui occaſionem praeſtat, damnum feciſſe videtur. In eodem 'crimine eſt, et qui non obſervavit ne ignis longius procederet. At, ſi 'omnia quae opportuit obſervavit, vel ſubita vis venti longius ignem pro-'duxit, caret culpa.' The defenders would, no doubt, be liable *ob dolum aut culpam* to Sir Robert, if they ſhould kindle muirbuirn in a windy day, or by careleſſneſs allow the fire to reach his woods. But, if they kindle muirburn, *optima fide*, to improve their land, or for feuel, when there is no apparent danger from the wind, or any other accident, they cannot be liable to Sir Robert, whatever the conſequences may be. The defenders, therefore, cannot be reſtrained in their property or poſſeſſions. And it is incompetent for a court of juſtice to make regulations or inflict penalties, as demanded, eſpecially in ſuch a caſe as this, which has been already regulated by ſeveral ſtatutes.

Anſwered for Sir Robert: The law which protects one perſon in the exerciſe of his property, likewiſe maintains his neighbour in the preſervation of his; and, without enforcing a mutual *comitas*, there would be an end to the peace and good order of ſociety. Where a man's operations are confined to his own property, and the effect of them is not *immittere* any thing deſtructive upon that of his neighbour, or where an act is neceſſary for the preſervation or defence of a man's property, great latitude would be allowed, though hurtful to neighbouring property. But, where the act is intended ſolely *in majus emolumentum*, or *lucri faciendi cauſa*, the law will not gratify an avaritious ſpirit, which deſires to make profit to itſelf at ſo great an expence as the deſtruction of the property or intereſt of a neighbour. And, upon this principle, it is laid down in the title *ff. de aq. et aq. pluv.* that no perſon can, *opere manufacto*, drain up the water on his own property, ſo as to occaſion an unnatural and deſtructive emiſſion of it.

If damage, therefore, were to be done to the purſuer's property by the muirburning of the defenders, it is clear that he would be entitled to reparation. The only queſtion, then, is, Whether the purſuer be entitled to any ſecurity for preventing a danger which is daily imminent? or, if he muſt calmly wait the deſtruction of his property, and then betake himſelf to an action for damages, which would very probably be fruſtrated by the poverty of thoſe who have occaſioned the loſs? The purſuer ought to have ſome remedy, upon the plan and principles of the Roman edict *de damno infecto*, or of our own caution in law-burrows.

If the court ſhall be of opinion, that no ſuch remedy ſhall be granted him in the preſent caſe, the purſuer ſubmits, if the old ſtatutes, diſcharging

ging muirburn from March to Michaelmas, ſhould not be enfored by additional penalties, the old ones being inſufficient. If this were done, the purſuer would have ſome ſecurity, as muirburn is moſt dangerous from March to Michaelmas. Such increaſe of penalties is not without a precedent; for, in the late diſpute between Scott of Brotherton and Carnegie of Craigie, this court enforced the obſervance of the old ſtatutes, regulating the exerciſe of the right of fiſhing, by a penalty of L. 50 Sterling for every tranſgreſſion.

Replied for the defenders: The edict *de aq. et aq. pluv.* does not at all apply to this caſe, as it relates ſingly to an *opus manufactum.* The caution *de damno infecto* was not introduced to prevent a wrong done intentionally, or by negligence; for ſuch wrongs were underſtood to be ſufficiently guarded againſt by the law which puniſhed theſe wrongs when committed; but it was introduced to prevent a miſchief apprehended *vitio rei, loci, vel operis*: And the reaſon of the diſtinction is obvious. The law can regulate the actions of men, but cannot prop a leaning wall or falling tree; and, if this remedy were to be extended from things to perſons, there would be no knowing where to ſtop. In the caſe of lawburrows, the damage feared muſt be from intention and deliberate purpoſe.

As to the caſe of Brotherton againſt Carnegie, the court was much divided, and different judgments were pronounced; and the cauſe was afterwards appealed, and the judgment reverſed of conſent. Beſides, that caſe differed in ſeveral reſpects from this. For, *firſt*, with reſpect to the cruives, every ſingle act of contravention was a damage to the ſuperior heritors; whereas the heather on the hill of Molundy may be kindled, and has been kindled, thouſands of times, without any danger to the purſuer. 2*dly*, In that caſe, the damage to the ſuperior heritors, though certain, was incapable of eſtimation, as it was impoſſible to ſay what part of the fiſh, intercepted by the illegal cruives, would have been taken by any of the ſuperior heritors. And, *laſtly*, in that caſe, there was a continued practice of delinquency, for ſeveral years, proved againſt the defenders.

'The Lords aſſoilzied, and found expences due.'

J. M.

Act. Advocatus, Sollicitor, *Lockhart, Henry Dundas.* Alt. *Burnet, Maclaurin.*

No. III. *February 7. 1765.*

CHRISTIAN KIRKPATRICK

Againſt

SHORT.

The effect of a ſpecial diſpoſition containing the whole ſubjects of the granter.

JANET Grierſon, upon the 20th of July 1761, granted to Chriſtian Kirkpatrick her niece, a gratuitous bond for an annuity of ſix pounds

 Sterling,

Sterling, to be paid yearly, during all the days of her life. In this bond ſhe reſerved power to herſelf to alter; and provided that the ſame ſhould be ſufficient, in ſo far as not altered by her; or, tho' it ſhould be found in her cuſtody, or in that of any other perſon, with the delivery of which ſhe thereby diſpenſed.

This bond was delivered to Chriſtian Kirkpatrick, ſome time before the death of her aunt. Thomas Short, a nephew of Janet Grierſon's, had afterwards the influence to procure from her a ſpecial conveyance to her houſes, which were her whole eſtate, excepting a little furniture, that ſcarcely defrayed the expences of her funeral. This diſpoſition, which was likewiſe gratuitous, contained the following clauſe: 'Reſerving to 'me my liferent-right of the premiſſes, and power to alter it *etiam in* '*articulo mortis*. And I oblige myſelf to warrant this diſpoſition to Tho-'mas Short, from all facts and deeds done, or to be done by me to the 'contrary; all of which I hereby recal, declaring this to be my only 'ſettlement with regard to the matters here contained; which I alſo de-'clare to be ſufficient, though lying by me undelivered at my death.'

Upon the death of Janet Grierſon, a proceſs was commenced, at the inſtance of her niece, againſt Mr Short, in whoſe favours the above mentioned diſpoſition was granted. The arguments inſiſted upon by the purſuer were, that her bond of annuity, though gratuitous, conſtituted her a creditor to her aunt, and gave her a right to inſiſt againſt the defender, who was bound by his acceptance of the diſpoſition, in which were contained the whole effects of the granter; and which deed, though ſpecial in appearance, was a general one in effect. She contended, that, if a perſon diſponed part of his eſtate gratuitouſly, his creditors might ſue for reduction upon the ſtatute 1621, if the reſt of his eſtate was not ſufficient to diſcharge their debts. That reduction upon that ſtatute had been allowed, in many caſes, by the court of ſeſſion, to gratuitous, as well as to onerous creditors; and therefore, though the ſettlement of the defender had contained a part only of the deceaſed's effects, in place of the whole, which it really did, this action of competition would have been competent to the purſuer, as there remained no other fund out of which her annuity could be paid.

The defender, on the other hand, inſiſted, that the purſuer's annuity was effectually revoked by the diſpoſition granted to him: That this diſpoſition was ſpecial, and inferred no repreſentation of the deceaſed; conſequently could never ſubject the defender to the payment of her debts. If ſhe could qualify herſelf to be a creditor by her gratuitous and revokable deed, ſhe would be entitled to inſiſt upon the act 1621; but that this was impoſſible for her to do, and the power of revocation had been exerced by the ſettlement in favours of the defender. That there was no inconſiſtency between the purſuer's bond of annuity and the diſpoſition to the defender; both were gratuitous; ſhe was entitled by the one to a certain ſum, in name of annuity; and he had a right, by the other, to certain ſubjects therein particularly enumerated and ſpecially diſponed: That, if ſhe could diſcover any other perſon who repreſented the defunct, ſhe might inſiſt for payment; but the defender was not that perſon, nor this action competent againſt him.

The

The court found, ‘ That the bond of annuity was revoked, in ſo far as ‘ concerned the ſubjects contained in the diſpoſition to the defender, ‘ and that it was revoked by ſaid diſpoſition.’

Act. *Montgomery.*

No. IV. *February* 8. 1765.

Colonel *CAMPBELL* Commander of the Revenue Sloop;

Againſt

JOHN MONTGOMERY, &c.

An unlawful ſeizure made at ſea does not veſt the admiral with a privative juriſdiction.

IN the month of Auguſt 1761, Martin Campbell, mate to Colin Campbell, ſeized two veſſels belonging to Newry in Ireland, loaded with Iriſh meal; the one lying at anchor in the harbour of Tobermory; and the other in the ſound of Mull, near to the coaſt of Morvern. Having brought theſe veſſels to Fort-William, he preſented a petition to the ſheriff of the county, praying that the meal and veſſels might be condemned, in terms of the ſtatutes 3d Cha. II. *anno* 1672; and of Queen Ann, chap. 9. 1703.

A proof being granted to both parties by the ſheriff, relating to the nature of the ſeizure, he was pleaſed to aſſoilzie the defenders, and to ordain the ſhip and cargo to be reſtored.

Before the proof was concluded, or a ſentence of *abſolvitor* obtained from the ſheriff, the ſeaſon became too far advanced for the proprietors of the cargo to proſecute their intended voyage for North Faro in Norway, whither they were bound. The damage ſuſtained by this delay made them bring a proceſs before the court of ſeſſion, containing certain indemnatory concluſions for the reparation of the loſs they had ſuffered by this illegal ſeizure.

The cauſe being called, parties were ordered to produce the whole procedure before the ſheriff. Which interlocutor having been obtempered, and Captain Campbell failing to compear, decreet in abſence was pronounced againſt him.

Being charged upon this decreet, Campbell *pleaded* a declinator to the juriſdiction of the court, founded upon the act of parliament 1681, chap. 16. by which it is provided, that the high-admiral ſhould have the ſole juriſdiction in all maritime and ſea-faring cauſes, of whatever kind: That in this caſe, as in moſt others, the place of committing the crime fixes the juriſdiction; and here, the unlawful act being done at ſea limits the cognizance of it to the high-admiral alone.

On

On the part of the chargers it was *pleaded*, That neither the *locus delicti* nor the *locus contractus* determined the jurisdiction; but that the nature of the cauſe alone could, properly ſpeaking, render it ſtrictly maritime: That the excluſive juriſdiction of the admiral, agreeable to the opinion of all our lawyers, was confined to queſtions concerning charter-parties, freights, ſalvages, bottomry, and policies of inſurance: That what rendered a cauſe properly ſea-faring, was its relation to foreign trade; ſuch as the importation or exportation of foreign commodities; and that murder, rape, inceſt, or any other crime, did not come within the juriſdiction of the admiral, though committed at ſea.

'The Lords repelled the objections to the juriſdiction of the court.'

Act. *Burnet*. Alt. Advocatus,

A. C.

No. V. *February* 9. 1765.

WILKIE

Againſt

WALLACE.

Action upon a libellus famoſus, *as competent*, prima inſtantia, *before the of ſeſſion.*

THE magiſtrates of Aberbrothock intended to ſet one of their mills to Wallace and company, who had eſtabliſhed a manufactory of Oſnaburgh in that place. This ſcheme was oppoſed by Bailie Wilkie, a member of council: And Wallace, in a memorial that he preſented to the council, having made uſe of ſome expreſſions injurious to Wilkie's character, and accuſing him of ſelfiſh and ſiniſtrous intentions, Wilkie ſued them for ſcandal before the court of ſeſſion.

Againſt this action Wallace offered a declinator to the jurisdiction; as actions for ſcandal were competent, in the firſt inſtance, before no other judges but thoſe of the commiſſary-court.

'The Lords repelled this declinator, and judged the cauſe themſelves.'

Act. *Lockhart*. Alt. *Rae*, A. C.

No. VI.

No. VI. *February* 9. 1765.

PETER LESLIE-GRANT of Balquhain;

Againſt

THOMAS DUNDAS of Fingaſk.

At what time bona fides *is interrupted, both with regard to the perſon who ſuffers an eviction, and his tackſman.*

IN the year 1756, Peter Leſlie-Grant, a ſubſtitute in the ſettlement of the eſtate of Balquhain, brought an action of reduction and declarator againſt Count Cajetan Leſlie and his three ſons, Counts Leopold, Anthony, and Charles, James Leſlie of Pitcaple, and his own father; concluding a reduction of the titles of Count Antonius, who had been found, by a judgment in the laſt reſort, to be the next heir upon whom the eſtate of Balquhain devolved, and who had, accordingly, made up his titles to that eſtate; and for declaring his own right thereto, in regard the ſeveral heirs called before him were perſons profeſſing the Popiſh religion, or aliens, born without the allegiance of his Majeſty, or both the one and the other.

The reſult of this proceſs of reduction, was a judgment of the court of ſeſſion, pronounced on the 4th of December 1761; by which it was found proven, that the purſuer's father was a profeſſed papiſt paſt the age of 15; that Count Cajetan and his three ſons were aliens, whereby they had no inheritable blood; and therefore the court declared the right in Count Anthony's perſon to be void and null; and another judgment, pronounced upon 5th February 1762, finding and declaring, that the purſuer was then the neareſt lawful proteſtant heir of tailzie entitled to ſucceed to the eſtate of Balquhain: Which judgments, upon an appeal, were affirmed by the houſe of lords, on the 2d of February 1763.

Count Anthony, whoſe reſidence was abroad, had ſet the eſtate to Mr Dundas of Fingaſk, for a tack-duty of 1000 ducats, payable upon the Exchange of Rotterdam, at two terms, by equal portions, viz. the 15th of January and the 15th of Auguſt, yearly; and as Mr Dundas was creditor to Anthony in very conſiderable ſums, it was agreed between them that Mr Dundas ſhould retain the tack-duty till ſuch time as theſe ſums were extinguiſhed.

The purſuer, immediately upon obtaining the judgment of the 4th of December 1761, had raiſed a proceſs of maills and duties againſt the tenants upon the eſtate of Balquhain, libelling particularly upon the above judgment, and concluding for payment of the bygone rents, and in time coming; and, immediately after the judgment of the 5th of February 1762, had alſo raiſed another proceſs of maills and duties againſt the ſaid Thomas Dundas and the other tenants, and againſt Antonius Count Leſlie, libelling particularly upon the laſt interlocutor.

The purſuer had likewiſe commenced a reduction of Mr Dundas's tack from Count Antonius, upon the 27th of July 1762, and obtained an interlocutor, reducing the ſame, upon the 19th of January 1764. Upon the 16th of November 1762, the purſuer, during the dependence of the appeal againſt the judgments annulling Count Antonius's right, and declaring his, in conſequence of an order from the houſe of lords, of the 7th of May 1762, allowing the court of ſeſſion, notwithſtanding of the appeal, to ſequeſtrate the eſtate, if they judged proper, obtained a ſequeſtration of the tack-duty payable by Mr Dundas for the laſt half of crop 1761, and in time coming.

Mr Dundas had let out the eſtate to ſubtenants, from whom he drew more rent than was payable by him to Count Anthony; ſo there aroſe two queſtions in the courſe of theſe proceſſes; one reſpecting the tack-duty payable by Mr Dundas, the other reſpecting the ſurplus rents over and above the tack-duty payable by the ſubtenants.

The purſuer inſiſted, that he was entitled not only to the tack-duty payable by Mr Dundas, but likewiſe to the full rents payable by the natural poſſeſſors, his ſubtenants, for the crop 1762 and 1763, and in time coming, and likewiſe for the tack-duty payable by Mr Dundas for the whole crop 1761.

And, *firſt*, with regard to the full rents for crop 1763, the purſuer contended, that, as Count Antonius's right was reduced upon the 4th of December 1761; that of the purſuer's, declared 5th February 1762; and theſe judgments affirmed by the houſe of lords in February 1763; and before the terms of payment for that crop ſpecified in the ſubtenants tacks had elapſed, the money-rent for ſaid crop 1763, as appeared from the tacks granted by Mr Dundas, falling due, the one half at Martinmas 1763, the other half at Whitſunday thereafter, and the victual-rent deliverable at Candlemas, after the ſeparation thereof from the ground; whence it was evident, that the purſuer's right was affirmed before any part of the rent for that crop was payable; and that the interlocutor reducing the tack, was pronounced upon the 19th of January 1764, before any part of the victual for crop 1763 was deliverable, and before the laſt half of the money-rent for that crop became due; ſo that the *fructus* were not ſo much as *percepti*, which was certainly indiſputable with regard to the victual-rent, and the laſt half of the money-rent for crop 1763. Therefore the *bona fides* was beyond all doubt ſet aſide by theſe judgments, and the purſuer, in conſequence of his right of property declared, and of his having operated a reduction of the defender's tack, as above ſtated, neceſſarily became to have the only right to the rent of that year, excepting the firſt half of the money-rent thereof, as to which there might be ſome doubt. 2*dly*, With regard to the firſt half of that year's money-rent, and the full rents for crop 1762, the purſuer contended, that he was juſtly entitled to them. Count Antonius's *bona fides* was interrupted by the interlocutor of the 4th of December 1761; and if this plea of *bona fides* ceaſed with reſpect to him, it muſt alſo ceaſe with reſpect to his tackſman, whoſe only right was derived from him, eſpecially that Mr Dundas himſelf was the perſon who chiefly conducted the proceſs on the part of the Count Leſlies, the defenders therein. But, if there was ſtill more done to put this defender *in mala fide*, a proceſs of maills and duties was raiſed immediately

mediately againſt this defender and the other tenants on the eſtate, after the 4th of December 1761; proceſſes of multiple-poinding were commenced by the tenants before any part of the rent for crop 1762 was payable; a ſummons of reduction of the defender's tack was brought in July 1762; and the purſuer's right to the eſtate declared the 5th of February preceeding; and another proceſs of maills and duties againſt the defender raiſed the 9th of the ſame month. In theſe circumſtances, the defender can never pretend to the protection of a *bona fide* poſſeſſion for crop 1762. The purſuer's intention to recover the rents of that crop, as payable by the natural poſſeſſors, was ſufficiently declared by the above mentioned proceſſes, in which ſeveral ſteps of procedure were made before any part of the crop 1762 was exigible. And, 3*dly*, With regard to the tack-duty for the year 1761, which the purſuer was only claiming, though he was well entitled to the full rent, it was in vain to argue, that, though Count Antonius's right was annulled in December 1761, yet that was no ſuch interruption of the *bona fides* as to entitle this purſuer to the tack-duty of that year, in reſpect that his right was not declared till the 5th of February thereafter. For it was evident, that the interlocutor on the 4th December, put Count Anthony *in mala fide* to intermeddle with the fruits of that year. Theſe behoved neceſſarily to belong to the perſon who ſhould afterwards be declared to have right to the eſtate: That this purſuer was that perſon, whoſe right truly exiſted as much upon the 4th of December 1761, as it did upon the 5th of February 1762, though it was only declared at this laſt mentioned period; neither could Mr Dundas, betwixt theſe two periods, *bona fide* make payment of that half year's rent to Count Leſlie after his right was declared void; and if he could not make payment of it to the Count himſelf, he could not retain it in payment of any debt due by the Count to him: That the reaſon why only the laſt half of the tack-duty 1761 was ſequeſtrated, was obvious: That both when the houſe of lords allowed the ſequeſtration, and the court of ſeſſion actually ſequeſtrated the eſtate, the firſt half of that year's tack-duty could not be conſidered as *in medio*, but as actually received by Count Leſlie, or his order.

On the other hand, it was *maintained* for the defender, that, the *bona fides* of Count Antonius, and, of courſe, of his, was not interrupted by the interlocutor of the court of ſeſſion 4th December 1761, but remained intire, and entitled him to retain the tack-duties which had fallen due, until the final judgment upon the appeal affirming the above interlocutor of the court of ſeſſion was pronounced by the houſe of lords, the 2d of February 1763; and that, with regard to the ſurplus rents payable by the ſubtenants over and above the tack-duty payable by the defender to Count Anthony, he was entitled to retain them till ſuch time as his own *bona fides* was interrupted, which was not the caſe until the 19th of January 1764, the date of the interlocutor reducing his tack.

It was alſo *contended*, that, the purſuer's prevailing in the declarato of right againſt Count Anthony, and in the reduction of his titles to this eſtate, did not, *eo ipſo*, vacate and annul the defender's tack, or liberate him from the obligations he had thereby come under; for that it was optional to the purſuer, upon his evicting the eſtate from the Count, to have held Mr Dundas bound by his tack, if he had eſteemed it a benefi-

cial

cial bargain; and therefore, this judgment againſt Count Anthony could be no interruption of the defender's *bona fide* poſſeſſion under the leaſe; at leaſt, it is certain, it could not have this effect, till ſuch time as the purſuer, after eſtabliſhing proper titles in his own perſon, did obtain a judgment of this court ſetting aſide the tack.

Nothing was more arbitrary, and leſs aſcertained by the deciſions of this court, than how long a *bona fides* ought to protect the party that loſes the cauſe from being accountable for the bygone profits. In reductions *ex capite lecti*, though the death-bed be never ſo notorious, yet ſtill the diſponee is protected by his *bona fides*, until the moment that the right is actually reduced.

That, the caſe of Eliſabeth Douglas againſt the laird of Wedderburn, determined in July 1762, was directly in point, where the defence of a *bona fides*, pleaded by the laird of Wedderburn, who was purſued for a ſpuilzie of teinds, upon this ground, that the Earl of Hume, his author's right, being reduced, his ſubaltern right of a tack alſo fell of courſe, tho' he was not called as a party in that reduction, was ſuſtained.

The like judgment was given in the competition about the eſtate of Pittrichie; where the ſiſters of Charles Maitland were found not accountable for the rents prior to the date of the judgment reducing their right to the eſtate. As Count Anthony himſelf, therefore, could not have been quarrelled for maintaining his poſſeſſion until his right was finally reduced by the houſe of lords in February 1763, ſo the defender muſt conſequently be entitled to the protection of the Count's *bona fides*, as to all the tack-duties prior to that period. That the defender, even upon ſuppoſition that the perception of the rents had been fraudulent on the part of the count, muſt be conſidered as a *bona fide* purchaſer, in virtue of his tack from him, agreeable to the doctrine of the *actio Pauliana* in the Roman law, and to our law in reductions upon the ſtatute 1621. With regard to the ſequeſtration of the tack-duty for the laſt half of crop 1761, and in time coming, as alſo the different proceſſes of maills and duties raiſed by the purſuer, no advantage could be derived from them in his favours in the preſent competition. The ſequeſtration was intended only to ſecure the rents till the event of the cauſe, and could operate in favours of neither party. The proceſſes of maills and duties were commenced by the purſuer when he had not the veſtige of a right that could found him in ſuch action, as they were all inſiſted in before his titles to the eſtate were ultimately eſtabliſhed. And it was for this reaſon that the defender, during the litigation, has been preferred to the tack-duties by an interlocutor of the Lord Ordinary, which reſerved to the purſuer the liberty of bringing a reduction as accords. Till ſuch time, therefore, as this reduction was not only brought, but decerned in, the defender was well entitled to the benefit of a *bona fide* poſſeſſion, and can be accountable only for the ſurplus rents payable by the natural poſſeſſors from that period, in the ſame manner as he is only bound to account for the tack-duties that fell due ſince the purſuer's right was finally declared in the houſe of peers.

The Lords, upon the report of the Lord Coalſton, found, 'That the 'defenders, the ſaid Count Antonius Leſlie and Thomas Dundas, 'were

'were both of them entitled to the privileges of a *bona fide* poſſeſ-
'ſor, till ſuch time as their *bona fides* was interrupted; that of the
'defender Count Antonius, by the interlocutor of the court, dated
'the 4th of December 1761; and that of Thomas Dundas, by the
'judgment dated the 19th of January 1764: And therefore found
'the defender Thomas Dundas, in virtue of his rights flowing from
'Count Antonius, was entitled to retain the whole of the rents
'which had been uplifted from the ſubtenants before the ſaid inter-
'locutor of the 19th of January 1764; and found the purſuer en-
'titled to the whole of the rents which were due by the ſubtenants
'at the date of that interlocutor, and which fell due by them there-
'after. And further found, that the defender Thomas Dundas, in
'virtue of his aſſignation from Count Antonius, was entitled to re-
'tain the tack-duties which had fallen due by himſelf before the
'ſaid interlocutor of the 4th of December 1761; but found him
'liable to account to the purſuer for the tack-duties that fell due by
'him after that time.'

A. C.

Act. *Graeme.* Alt. *Lockhart.* Clerk *Pringle.*

No. VII. *February* 13. 1765.

WALTER Lord *Torphichen;*

Againſt

Mr *GILLON* of *Walhouſe.*

A patron, upon the building of a new church, has a preference in the choice of his ſeat, though his intereſt in the pariſh was trifling, aud the other heritors paid in proportion to their valuations.

THE old church of Torphichen having been taken down, and a new one erected, the area of the church, of courſe, came to be the ſubject of diviſion. His Lordſhip was undoubted patron and titular of the teinds in the pariſh, in virtue of grants from the crown to his family, whereby he and his anceſtors were veſted, as coming in place of the preceptor, with the property of the lordſhip and barony of Torphichen, and all the privileges thereto belonging. He was alſo ſuperior of a conſiderable part of the pariſh, of the moſt part of which he was formerly the proprietor, though his property at preſent therein was but trifling. When the heritors conveened, his Lordſhip inſiſted, that he, on account of his pretenſions, as above ſtated, was well entitled to the firſt choice of a ſeat. And, 2*dly*, That he had right to a ſeat of the ſame dimenſions with the one that had been poſſeſſed by his family, from time immemorial, in the old church in Torphichen. Mr Gillon, on the other hand,

and the reſt of the heritors, were of opinion, that, as the new church was built by the heritors in proportion to their reſpective valuations, the extent of their valuations muſt determine the preference of choice, and likeways the *quantum* which fell to be alloted for the accommodation of each heritor; and that, as Mr Gillon ſucceeded to the Earl of Hopton, who formerly had the higheſt valuation, he was therefore entitled to the ſame preference Lord Hopton would have had, if he had not diſponed his right to him. The bone of contention between the parties was, which of them ſhould have poſſeſſion of the only aile in the new church, oppoſite to the pulpit, as being not only the moſt reſpectable ſituation, but likewiſe beſt calculated for having a full view of, and being well viewed by, the congregation.

'The court, in reſpect that Lord Torphichen was patron of the pa-
'riſh, titular of teinds, and an heritor in the ſame, found him entitled
'to the firſt choice of a ſeat in the church, and likewiſe of the di-
'menſions claimed by him.'

A. C.

No. VIII. *February* 14. 1765.

JOHN M'NAUGHTON;

Againſt

JAMES WILSON.

A houſe and park being let as one ſubject, and for a rent in cumulo, *but the entry to the park at Candlemas, to the houſe at Whitſunday, the tenant muſt be warned to remove* 40 *days before the Whitſunday preceeding the Candlemas.*

BY tack dated 15th May 1760, Wilſon let to M'Naughton, at L. 14 of rent, a houſe and park, for three years from his entry; which was declared, 'as to the graſs park, to have been and begun at 'the term of Candlemas laſt; and to the dwelling-houſe, factory, office-'houſes, and other pertinents, at the term of Whitſunday now inſtant.'

After the years of the tack, M'Naughton poſſeſſed a fourth year by tacit relocation. Wilſon having brought an action of removing before the judge-ordinary, in terms of the act of ſederunt 14th December 1756, § 2. he obtained a decree in abſence, 21ſt December 1763, and ejected M'Naughton 21ſt May 1764.

M'Naughton brought a reduction of this decree, and *contended*, that, as both the commencement and termination of his tack, as to the park, was at Candlemas, the action ought to have been brought 40 days before the Whitſunday preceeding, viz. 1763.

Anſwered for Wilſon: By the firſt clauſe of the act of ſederunt, a tenant, who has obliged himſelf to remove without a warning, may be charged

ged with horning ‘ 40 days preceeding the term of Whitſunday *in the* ‘ *year in which the tack is to determine.*’ The ſecond clauſe declares, that an action of removing before the judge-ordinary being called, ‘ at ‘ leaſt 40 days before the term of Whitſunday, ſhall be held as equal to ‘ a warning executed in terms of the act 1555.’ The term of Whitſunday, in the laſt clauſe, muſt be the ſame with that deſcribed ſo particularly in the firſt, viz. the Whitſunday ‘ in the year in which the tack is to de- ‘ termine.’ If ſo, it was ſufficient, in the preſent caſe, to have brought the action 40 days before Whitſunday 1764, being that in which the tack was to determine; whereas it was brought full five months before that term. 2*dly*, The removing is allowed to have been regular as to the houſes. Theſe, which were fitted up for an inn, were the principal ſubject in the leaſe. The park, which contains only four acres of ground, and part of it of very little value, could not be rated at above a third of the total rent. It could therefore be conſidered as an acceſſory only to the houſes; and, as M‘Naughton has been regularly removed from theſe, he will not be allowed to keep poſſeſſion of the park, which, as an acceſſory, muſt go along with its principal.

Replied for M‘Naughton, to the *1ſt*: The act 1555 required a warning 40 days before Whitſunday, *i. e.* 40 days before the Whitſunday preceeding the term of removal, if that term be not Whitſunday, according to the opinion of Lord Stair, Inſt. p. 643.; M‘Kenzie's Obſerv. upon the act 1555.; and Lord Bankton, vol. 2. p. 109. 111. The act of ſederunt 1756, did not alter theſe regulations, ſo far as they regard the preſent queſtion. It only introduced a removing without a warning, but left that removing ſubject to the ſame rules with the warning. To the 2*d*, The park, when properly managed, yields 40 bolls of grain; and therefore cannot, with any propriety, be conſidered as an acceſſory in a ſubject whereof the whole rent is but L. 14. The ſame plea was urged, but rejected, in a caſe preciſely ſimilar, 19th February 1740, Hay againſt Carſe. *Vide* Dict. *voce* Removing.

Nota. There was no proof with regard to the value of the park.

The Lords found, ‘ That, as by the tack M‘Naughton's entry to the ‘ poſſeſſion of the park is declared to be at the term of Candlemas, ‘ and his entry to the houſe at the Whitſunday following, the pro- ‘ ceſs for removing him from the park at the term of Candlemas ‘ 1764, and at the term of Whitſunday, that year, from the hou- ‘ ſes, ought to have been brought 40 days preceeding Whitſunday ‘ 1763; and, as it was not brought till the 21ſt December 1763, ‘ found the removing could not proceed.’

A. R.

Act. *J. Dalrymple. Kirkpatrick.* Alt. *James Ferguſon* tertius. Reporter *Auchinleck.* Clerk

No. IX.

No. IX. *February* 20. 1765.

WILLIAM SLOWAN;

Againſt

HUGH HAWTHORN of *Caſtlewig.*

A tackſman of a mill not entitled to deduction out of the rent for the multure of part of the thirled lands poſſeſſed and laid in graſs by the proprietor of the mill.

HAWTHORN had let to Slowan the mill of Buſbie, with multures, ſuckens, &c. During the currency of the tack, Hawthorn purchaſed the lands of Drummoral, being the moſt conſiderable farm within the thirl, took them into his own poſſeſſion, and laid them in graſs.

At the end of the tack, Hawthorn having purſued Slowan for arrears of rent before the ſheriff-depute of Wigton, Slowan craved deduction for the multures of the lands of Drummoral, which was denied by the ſheriff. Slowan preſented a bill of advocation; and that having been refuſed, he preferred a petition to the whole Lords, pleading, that it was againſt equity he ſhould be obliged to pay rent for multure which had been withheld from him by the heritor himſelf; and that, if the heritor might do this with one farm, he might do the ſame with the whole lands within the thirl, and ſo ruin the tenant at pleaſure.

The Lords ‘ adhered to the Lord Ordinary’s interlocutor, and refuſed ‘ the bill.’

A. R.

Petitioner *Robert Campbell.*

No. X. *February* 20. 1765.

Earl of *LAUDERDALE;*

Againſt

GEORGE INGLIS of *Reidhall.*

Inhibition does not interrupt preſcription of a real right to tithes.

THE Earl of Lauderdale, ſtanding infeft in the patronage and tithes of the pariſh of Hales, having brought a proceſs of reduction and

and improbation againſt ſeveral of the heritors of that pariſh, Mr Inglis produced a progreſs to the lands and teinds of Reidhall from the year 1693, and pleaded a preſcriptive right to theſe tithes.

Lord Lauderdale produced ſeveral inhibitions, with general executions againſt the heritors of the pariſh, at the church-door of Hailes, whereof the lateſt was in 1731, and contended, that theſe were ſo many interruptions of preſcription. What he urged in ſupport of this plea was, that the law has warranted the edictal execution of inhibitions of teinds at the church-door, as equivalent to a perſonal ſervice of the diligence. It is upon this ground that ſuch important effects are given to theſe inhibitions. They interrupt tacit relocation, not only as to that year in which they are ſerved, but of all ſubſequent ones whereof the titular does not receive the tithes. *Bona fides* is no defence to a tenant, who, after inhibition, pays the teinds to a perſon in poſſeſſion as formerly; 27th March 1628, Lord Blantyre. Thoſe who intromit after inhibition, are even liable in a ſpuilzie. More particularly, it has been expreſsly determined, that inhibitions had the effect now contended for; 25th January 1678, Duke of Lauderdale. Indeed, a contrary doctrine would very much endanger the rights of the crown, as well as other titulars, as they are not uſually very exact or rigorous in levying the tithes, and cannot be ſuppoſed to be conſtantly attentive to the tranſactions among heritors calculated for creating titles of preſcription. In fact, they are often ignorant who are in the uſe of intromitting with the teinds; and therefore, the law has very properly introduced this form of diligence, executed edictally, ſo as it may come to the knowledge of the whole pariſhioners, and put thoſe, who have not a legal title, *in mala fide* to continue their poſſeſſion of the tithes.

Anſwered for the defender: By the *common* law of Scotland, no proceſs of law, or ſtep of diligence, has the effect to interrupt preſcription, without *legal intimation* to the party, *i. e.* by the proper officer of the law, and in the manner the law has directed, ſuch as is properly called *an execution.* Thus, if one ſhould intimate verbally, or write a letter to his debtor, that he had raiſed a ſummons againſt him, it would not interrupt preſcription. 2*dly*, The execution muſt be ſpecial with reſpect to the perſon againſt whom it is directed. There is no inſtance of that effect being given to a citation by proclamation or an *edictal citation*, as it is called: That againſt tutors and curators is no exception, being only an acceſſary to the principal execution againſt the minor himſelf.

By the *ſtatute-law* 1669. c. 9.; 1696. c. 19. ſeveral other particulars are required in the interruption of preſcription in real rights, not one of which are obſerved in theſe inhibitions.

Though it were allowed that theſe inhibitions would have the effect to interrupt tacit relocation, it would not follow that they would interrupt preſcription of an heritable right to tithes. The ſtile of the letters ſhews they were meant to affect thoſe only who poſſeſſed the tithes by tack or cuſtom, not by real right or infeftment. There is no doubt, they had their origin from the practice of the churchmen, who took this way to intimate their intention to draw the tithes themſelves, and not to accept of a tack-duty in place of them. Tacit relocation may be interrupted by a general citation upon letters from the commiſſaries; Bankton,

B. 2. tit. 8. § 180.; but it could not be maintained that ſuch citation would interrupt preſcription of an heritable right to teinds.

The caſe of the Duke of Lauderdale was but a ſingle one. Beſides, the ſtatute 1696 was not then made, and the inhibition there founded on was ſerved in 1664, before the act 1669, which has no retroſpect.

'The Lords ſuſtained the defence of preſcription, and aſſoilzied.'

A. R.

Act. *Rae.* Alt. *Burnet.* Reporter *Barjarg.* *Roſs* Clerk.

No. XI. *February* 21. 1765.

STENHOUSE;

Againſt

INNES and *BLACK.*

Perſonal and Real.

JOHN Stenhouſe diſponed his lands of Southfod to his eldeſt ſon John Stenhouſe, with the burden of all his debts, and referring to an heritable bond granted by the ſon to him, of the ſame date, which mentioned the names of the creditors, but not the ſums due to them.

John Stenhouſe younger, having granted two heritable bonds over the lands to Iſobel Innes and William Black, a competition aroſe between them and John Stenhouſe elder.

John Stenhouſe having claimed a preference for relief of his debts, in virtue of the diſpoſition and heritable bond, the other two creditors objected, that the amount of the debts did not appear upon record, and that it was now fixed that general burdens are ineffectual againſt creditors and ſingular ſucceſſors.

Anſwered for Mr Stenhouſe.: It is not neceſſary that the amount of the burden ſhould appear upon record; it is enough that the record ſhew there is a burden, and direct the creditor or purchaſer how to diſcover the amount of it: Hence it has been found, that a general reference in the ſeiſine to the diſpoſition where the extent of the burden is mentioned, is ſufficient; Creditors of Smith, 26th July 1737.—Dictionary, vol. 2. p. 71; Callenders *contra* Waddel of Eaſtermoffat, 1761. Here the ſeiſine upon the diſpoſition refers to the heritable bond; and as that contains the creditors names and deſignations, ſingular ſucceſſors, whether creditors or purchaſers, have it in their power to learn the amount of the burden. The record is in the ſame ſituation in both caſes; the only difference is, that, in the preſent, the ſingular ſucceſſor is obliged to go one ſtep farther; but the faith of the records being out of the queſtion, that is but a light object compared with the defeating of the ſolemn contracts of parties.

'The

'The Lords found, That the clauſe in the diſpoſition granted by John 'Stenhouſe in favour of his ſon, by which the diſpoſition is bur-'dened with the whole juſt and lawful debts then due by the fa-'ther, without mentioning either the names or the ſums due to 'them, did not create a real burden upon the lands diſponed, *quoad* 'theſe debts; and found, that the defect was not ſupplied by the he-'ritable bond which was granted, of the ſame date, nor by the in-'feftment which followed thereon.'

A. R.

For John Stenhouſe, *Rolland.* For the Creditors of John Stenhouſe younger, *Lockhart.* Reporter *Coalſton.* Clerk *Pringle.*

No. XII. [*February* 21. 1765.

MARGARET SHORT;

Againſt

JOHN DONALD.

The mother preferred to the cuſtody of a baſtard daughter, though paſt ſeven years of age. The father found liable in aliment till the child be fourteen.

MARGARET Short bore a baſtard daughter in March 1757. John Donald acknowledged himſelf the father, did public penance, and made ſome trifling advances for the expence of inlying and the child's maintenance; but having been afterwards married, he diſcontinued the aliment. Margaret Short having brought a proceſs againſt him before the court of ſeſſion, he offered to take the child into his own family, under proteſt, that, otherwiſe, he ſhould be relieved of the aliment.

The Lord Ordinary found the defender liable to the purſuer in L. 3 Sterling, as the expence of her inlying, and in L. 4 Sterling yearly, as the aliment of the child for 14 years.

Donald reclaimed, and urged his claim to the cuſtody of the child, with the following arguments. A father has the ſole power of directing both the reſidence and education of his child. This is undoubted in the caſe of lawful children; and there appears no ſolid ground for a diſtinction between that and the caſe of illegitimate iſſue. The father's relation is the ſame in both caſes; and if his ſex, or a preſumption of the ſuperiority of his rank and character, are the circumſtances which give him a preference to the mother in the former caſe, theſe, ſurely, are no leſs in his favour in the latter. The brocard, that baſtards have no father, takes place in queſtions regarding their ſucceſſion only: But this is ſo far from being the caſe in claims for aliment, that theſe are founded on filiation, and the purſuer's own libel bars her from ſaying the defender is not the father of her child.

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In this caſe, it is an important circumſtance, that the child is paſt ſeven years of age. Under that age more may be ſaid in favour of the mother's claim to the cuſtody of the child, as women are, no doubt, better qualified for the care of infants than men. But, after ſeven, children become capable of education. It is then not only the father's right, but his duty to take care of them. Even juſtice to the child itſelf requires it ſhould be under his direction.

Mothers, ſo far from being entitled to, are not allowed the cuſtody of their lawful children after ſeven. The children are then committed to their tutors. 'Ane minor, (ſays Balfour, Keeping of Minoris) beand paſt 'ſevin zeiris of age, ſould not be in the keeping of his mother thereafter;' 18th February 1551, Clephen *contra* Laird of Wemyſs. The ſame found, Langhaw *contra* Muir, 4th July 1629; Finnie *contra* Oliphant, 22d February 1631; Davie *contra* Davie, 6th February 1666. In the caſe of Burgeſs *contra* Halliday, 4th March 1758, the mother was, indeed, found entitled to the cuſtody of her baſtard child; but the child was not three years old.

If this ſhould be thought an arbitrary queſtion, and determinable by circumſtances, the light in which it was regarded in the civil law, *l.* 5. § 2. *De agnoſc. et lib.* it muſt appear highly improper to commit a young girl to the care of one, who, by her own vicious life, has proved herſelf ſo unworthy of ſuch a truſt. An irregular ſtep of this kind has been found to diſqualify a mother from being tutrix to her lawful children; 14th July 1557, Largo *contra* Monipenny. And no wonder it ſhould, when even the lawful act of entering into a ſecond marriage has the ſame effect, as has been found in a variety of caſes.

Anſwered for the purſuer: The queſtion, Who ſhould have the cuſtody of children after their father's death, was arbitrary in the civil law, *l.* 1. *pr.* § 1. *ff. Ubi perp. id vel more debeat, l.* 1. *C. eod. tit. Vect.* § *eod. tit.* And all the lawyers agree, that the mother, unleſs ſhe marry another huſband, ought to have the cuſtody of her child while under the age of pupillarity; none of them limit it to the child's age of ſeven.

From the deciſions marked in the Dictionary, v. Tutor and Pupil, p. 485. 486. it appears, that, for a long time paſt, the ſame diſcretionary power has been exerciſed by the court of ſeſſion. In the caſe, Finny *contra* Oliphant, as well as thoſe mentioned from Balfour upon this head, it appears the mother had married a ſecond huſband.

There is no reaſon for the diſtinction made by the defender between children under and above the age of ſeven. In the caſe of a female child, eſpecially, it were highly improper to take her from her mother and commit her to a male guardian, juſt at the time when her mother's inſtructions and example begin to be of uſe to her.

But, 2*dly*, Whatever may be the law as to lawful children, the caſe of illegitimate ones is extremely different. A father, while alive, has, no doubt, the ſole right to the cuſtody of his lawful iſſue. But the ſame rule will not hold as to natural children: For though, upon proof of a man's correſpondence with the mother, the law will ſubject him in the expence of maintaining the child; yet, in every other queſtion, it is held uncertain whether he is the father, and in that concerning the cuſtody of the child as well as any other; for this reaſon, that, from the doubt he muſt for

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the moſt part entertain, whether he is the father, and his little connection with the child during its infancy, it is not to be expected he will be very tenderly attached to it. As to the mother, there is no uncertainty. The connection with her is the ſtrongeſt. She, therefore, has always been preferred to the cuſtody of her baſtard child; and there is no inſtance of its being limited to the child's age of ſeven; nor is there any reaſon it ſhould, as the father's connection does notthen become any ſtronger than before.

The reaſon why a mother loſes the tutorial office upon entering into a ſecond marriage, is, that then ſhe herſelf becomes under curatory: That, therefore, can afford no argument in the preſent queſtion. The caſe, Largo *contra* Monipenny, 14th July 1557, is but a ſingle one; and probably would not be made a precedent now, as a mother may, no doubt, perform the office of tutory, though ſhe has made an irregular ſtep of this kind.

As to the circumſtances of this caſe, the purſuer has produced a certificate, that ſhe has lived irreproachably ſince her unfortunate connection with the defender. The defender ſtill affects to doubt whether he is the father, and is, beſides, married to another woman, who, it is to be feared, might prove to the child one of the worſt of ſtepmothers.

The defender alſo *contended*, That there was no medium for finding him liable in aliment, ſo long as till the child was 14 years old. Girls become *puberes* at 12, may chuſe curators to themſelves, may marry, may diſpoſe of their perſons at pleaſure. The mother muſt then loſe all authority over her child. The defender, therefore, cannot be ordained to pay to *the mother* aliment after that period. In the caſe, Burgeſs *contra* Haliday, aliment was found due till 10 years of age only, and that too upon the father's conſent. There is no example of the aliment's being extended beyond ſeven, *in foro contentioſo*. In the caſe, Paterſon *contra* Cochrane, 14th February 1758, aliment was found due for 14 years; but there the term was not the point in debate.

Anſwered for the purſuer: This queſtion does not depend upon the age of puberty. The child muſt be maintained by the father till it may be ſuppoſed capable of acquiring aliment for itſelf. In this country, it ſeldom happens that girls are able to earn their own maintenance before the age of 14. The deciſion, Paterſon *contra* Cochrane, is quite expreſs, finding maintenance due till the child was 14 years of age; and, in the other, Burgeſs *contra* Halliday, the only point in debate was, with regard to the cuſtody.

'The Lords adhered to the Lord Ordinary's interlocutor.'

A. R.

Act. *Ilay Campbell.* Alt. *George Wallace.* Clerk *Kirkpatrick.*

No. XIII. *February* 27. 1765.

ADAM CRAWFURD-NEWALL;

Againſt

HUGH MITCHELL, and others.

The property of the ſubject ſold found not to be transferred, the purchaſe appearing to have been made with a fraudulent intention.

THE purſuer, Adam Crawfurd, upon the 17th of May 1763, ſold to James Mitchell younger of Rigg, twenty-one black cattle, at the price of L. 57 Sterling; for which ſum Mitchell granted his bill, payable againſt the term of Lammas thereafter. James Mitchell, upon the ſame day, alſo purchaſed from John Tenant in Coreton, fifty-one black cattle, for L. 147 Sterling, which was inſtantly delivered to him. Mitchell upon the 18th, the day after theſe purchaſes, was proceeding with the ſame to England, when Hugh Mitchell, and two other of his creditors, did, in virtue of letters of horning againſt him, at their inſtance, poind and carry off the cattle. The purſuer having got information of what had happened, upon the 19th of the ſaid month, before the cattle had reached Cumnock, where the poinding was to be compleated, came with a notary and witneſſes, and having ſeparated the cattle ſold by him from the reſt that were poinded, and repreſented to the meſſenger, that the cattle had been purchaſed from him only the day before the poinding; and, upon the meſſenger's refuſing to return them, proteſted, that they ſhould be found liable in the price, and for all damages that might occur in recovering the ſame; and this requiſition and proteſt was renewed by the purſuer at the market-croſs. A petition was afterwards preſented by him to the ſheriff of Air, praying a ſequeſtration of the cattle during the competition; and an application was afterwards made by the poinders for a removal of the embargo. Upon adviſing of which, warrant was granted to diſpoſe of the cattle by public roup; which having been done, bills were taken payable to the ſheriff-clerk of Air, for the behoof of all concerned. The purſuer, in his own name, and as aſſignee to John Tennant, brought an action againſt the poinders for the price of the cattle, and concluding, that the ſheriff-clerk of Air ſhould be ordained to deliver up to him the bills, or to pay him the contents of the ſame. This action having come in courſe before the Lord Ordinary, his Lordſhip found, that as Mitchell was not denied to have been inſolvent at the date of the ſale, and that he fled the country the day after the purchaſe of the cattle, and that it appeared from a letter, dated the 19th of May, the ſecond day after the purchaſe, he had intimated a meeting of his creditors, and acknowledged his inſolvency, found the bargain fraudulent, and that the property of the cattle was not transferred to Mitchell, ſo as to be attachable by his creditors in prejudice of the purſuer.

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The defenders having reclaimed to the inner houſe, and *inſiſted*, That, as Mitchell was a drover by profeſſion, and in uſe to ſet out for markets in England immediately after he made purchaſes of cattle, and having alſo left a conſiderable number of cattle upon his farms when he went away, it could not be preſumed that the bargain was fraudulent on his part, or that he had any intention to defraud his creditors by making it. But the purſuer *contended*, That, from the facts before mentioned, there was ſufficient evidence of a *ceſſio fori intra biduum vel triduum* of the purchaſe and delivery, not only by the letter of the 19th of May, but likewiſe, by his taking ſanctuary within a few days of the ſale; and that the court had uniformly, in ſuch caſes, found a *praeſumptio juris et de jure* of a fraudulent intention, and that the property of the ſubject ſold could not, in ſuch inſtances, be transferred. The caſe of *Cave*'s creditors was preciſely in point, and had never been deviated from ſince that judgment was pronounced.

'The court refuſed the deſire of the petition, and adhered to the Lord 'Ordinary's interlocutor.'

A. C.

No. XIV. *June* 14. 1765.

Mrs *HELEN-ADAM LAUDER;*

Againſt

Sir *ANDREW LAUDER* of *Fountainhall*, Baronet.

The widow of an apparent heir to an entailed eſtate, entitled to no aliment after the death of her husband.

THE purſuer, Mrs Lauder, having been privately married to Mr Lauder, ſon to the defender, who, a ſhort time after the marriage, went abroad to the Eaſt-Indies, without having ſettled any alimentary proviſion upon his wife, ſhe found herſelf under the neceſſity of having her marriage declared before the commiſſaries, whoſe decree was affirmed by the court of ſeſſion.

Upon this, ſhe brought an action before the court of ſeſſion againſt her father-in-law, for an aliment; in which, after a good deal of oppoſition, the following interlocutor was pronounced by the court: 'In re-'ſpect of the particular circumſtances of the caſe, and that the purſuer's 'huſband is gone abroad to the Eaſt-Indies, ſuſtain action at the purſu-'er's inſtance againſt the defender, for aliment, and find the defender 'liable to aliment her accordingly; and modify ſaid aliment to the ſum 'of L. 15 Sterling yearly, to be paid at two terms in the year, Whitſun-'day and Martinmas, by equal portions, beginning the firſt term's pay-'ment thereof at Whitſunday laſt, for the half year immediately pre-'ceeding.'

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In this judgment her father-in-law, Sir Andrew Lauder, acquieſced, until ſuch time as he got intelligence of his ſon's having died, after receiving an enſign's commiſſion in the Eaſt-India ſervice.

Upon this he offered a ſuſpenſion of the interlocutor, and repeated a reduction of it. The grounds upon which he contended that he was no longer bound by the interlocutor of the court, decerning an aliment to his daughter-in-law, were theſe; that, as the chargers claim of aliment was grafted upon her huſband's right to aliment, as the apparent heir of his father in an entailed eſtate, it muſt fall with his right, which undoubtedly determined with his life; that the natural obligation upon parents to maintain their children, when unable to ſupport themſelves, could not avail the charger in the preſent caſe. He had done every thing already that he could be compelled to do in conſequence of this natural obligation, as he had equipped his ſon, upon his going to the Eaſt-Indies, after giving him a ſuitable education, at a much greater expence than his ſmall fortune could afford, or his family ſpare, which conſiſted of ten younger children, all unprovided. That though, by the ſtatute 1491, an heir is entitled to an aliment when his eſtate is totally liferented; yet this claim ſubſiſts no longer than his character of heir and fiar remain. If he ſhould renounce, and betake himſelf to ſingular titles to the eſtate, he would have no right to an aliment from the liferentrix: That the right to an aliment by an heir-apparent in an entailed eſtate, was derived from this ſtatute, and could ſubſiſt no longer than his apparency continued, which certainly died with himſelf.

That a wife, upon her marriage, became entitled to all the rights and privileges belonging to her huſband, which were tranſmiſſible by him, and in his power to alienate.

But, the claim of an apparent heir of tailzie was not of this ſort: That his right was ſtrictly perſonal to himſelf, and intranſmiſſible to any other perſon; and, whatever pretenſions his wife may have in the right of her huſband during his life, yet, as that right died with himſelf, it was impoſſible it could ſubſiſt, after he was gone, in her perſon. If ſuch was the caſe, an heir of entail, who is no better than a liferenter, might, without any act or conſent of his own, be loaded with alimentary proviſions to ſeveral wives at the ſame time, ſufficient to exhauſt the eſtate.

The charger, on the other hand, ſupported her plea of aliment, upon the general principle of parents being under a natural and indiſpenſible obligation to maintain and aliment their children.

That, if a father was bound to aliment his ſon, when otherwiſe unprovided, this right, competent to the child, behoved neceſſarily to be communicated to his wife, as wives are unqueſtionably entitled to all the privileges belonging to their huſbands: That the connection between man and wife was ſo intimate, that, in all matters where the civil rights of either are concerned, the greateſt doctors in the canon, the municipal, and natural law, have uniformly been of opinion, that there was no diſtinction to be made, the parties themſelves being conſidered as one fleſh. A great many learned authorities were quoted in ſupport of this doctrine, and particularly from the civilians, to ſhow in what an extenſive ſenſe this obligation upon parents was interpreted, in every country where the Roman conſtitutions had prevailed: That, under the appellation of children

dren, a ſon's wife was always comprehended, and that a father was as much bound to ſupport his *nurus*, or daughter-in-law, as he was his own ſon: That, where the natural obligation was ſo ſtrong, the particular inſtitutions of any ſtate were hardly ſufficient to diſſolve it.

That the law of this country, ſo far from having laid down any rules inconſiſtent with this obligation, was, in every caſe, particularly attentive to the intereſt and proviſion of wives; and it appeared extremely hard, that, when a right is acknowledged to be competent to an heir of tailzie, his wife, who participates of every other, ſhould be excluded from that, for no other reaſon, but becauſe the law in this inſtance favoured the intereſt of her huſband.

'The court found no aliment due.'

A. C.

Montgomery and *M'Intoſh.*

No. XV. *June* 19. 1765.

JOHN MOWAT late Mealmaker in Edinburgh;

Againſt

The LORD PROVOST, MAGISTRATES, and TOWN-COUNCIL, of the City of Edinburgh.

To what extent a borough liable to repair damage done to a houſe by a mob?

BY a ſtatute 1ſt Geo. I. it is, *inter alia*, enacted, 'That all proſecutions for repairing the damages of any church or chapel, or any building for religious worſhip, or any dwelling-houſe, barn, ſtable, or outhouſe, *which ſhall be demoliſhed or pulled down*, in whole, or in part, within Scotland, by any perſons unlawfully, riotouſly, or tumultuouſly aſſembled, ſhall and may be recovered by a ſummary action, at the inſtance of the party aggrieved, his or her heirs or executors, againſt the county, ſtewartry, city, or borough, reſpectively, where ſuch diſorder ſhall happen, the magiſtrates being ſummoned in the ordinary form, &c.'

Mr Mowat brought an action againſt the magiſtrates of Edinburgh, libelling upon this ſtatute, and ſubſuming, that, without his having given offence, or cauſe of provocation, to any perſon whatever, upon the days and nights of the 21ſt, 23d, and 22d of November 1763, his houſe was invaded, his family inſulted, and his houſe and furniture demoliſhed, in a lawleſs manner, by a number of perſons riotouſly and tumultuouſly aſſembled; and concluding for damages done to his houſe and furniture, to the amount of L. 51 : 7 : 10 Sterling, as computed at moderate prices, or aſcertained by the accompts of wrights, glaziers, and other tradeſmen.

The magiſtrates *anſwered*, That it was true, a mob or riot had happened at the time libelled, and that the rioters had gone into the purſuer's houſe, damaged his windows, and carried off furniture and other moveables, to what extent the defenders could not ſay, tho' they believed the account given in by the purſuer might be very juſt; but that, as the act on which the proceſs was founded introduces an extraordinary action for reparation, *extra communes juris regulas*, it ought to be ſtrictly interpreted, and reparation only awarded to Mr Mowat for damage done to his houſe, not for furniture or other moveables ſtolen out of it. The words of the ſtatute do not extend to theſe laſt; and it would be very dangerous to carry his indemnification ſo far; for he would be equally entitled to inſiſt that the defenders ſhould make good to him any ſum of money that might have been taken out of his houſe; and the proprietors of either of the banks, in caſe of their offices being demoliſhed, and their whole caſh and notes being carried off, would be equally entitled to inſiſt, that the town ſhould make up to them that immenſe loſs. That, if the court ſhall think the purſuer entitled to reparation in whole, or in part, as it is clearly not the intendment of the ſtatute that the magiſtrates ſhould make good the damage out of their own private eſtates, or the common good of the borough, but that it ſhould be levied from the inhabitants of the borough in which the damage was done, the court would fall to direct in what method the ſum ſhould be levied, and allow a reaſonable time for that purpoſe.

Replied for the purſuer: The ſtatute muſt be interpreted ſo as not to run it into an abſurdity; but it would be abſurd to award the purſuer reparation for damage done to a ſtone or a window in his houſe, and yet refuſe it him for the deſtruction of his furniture. Had the ſtatute enacted, that, whoever burnt a dwelling-houſe ſhould be liable to repair the damage, it could not be ſeriouſly argued, that the enactment only extended to the bare walls of the houſe, but did not comprehend the furniture. The two expreſſions which the act makes uſe of, viz. demoliſhing and pulling down, extend both to the walls and furniture, though, perhaps, they would not to money or goods in the houſe for ſale, theſe not being neceſſary for the purpoſe of dwelling or habitation. As to the method of levying what ſhall be awarded in name of damages, that may be done by a taxation on the inhabitants of the borough, in the ſame way as other taxations are levied; but with this the purſuer has no concern.

Obſerved on the bench: An action of this kind was brought at the inſtance of one Straiton, againſt the town of Montroſe, and the court, by interlocutor 8th February 1743, refuſed to give reparation for any thing but damage done to the houſe. A diſtinction ſhould be made between what is fixed, and what not. Damage done to the firſt ſhould only be repaired.

'The Lords found the defenders liable for the damage done to the 'houſe, but not for that done to the furniture.'

J. M.

Act. *Henry Dundas*. Alt. *Montgomery*. Reporter *Auchinleck*.

No. XVI.

No. XVI. *June* 19. 1765.

JAMES BUCHANAN of Tilliecheun, and his Factor;

Againſt

JOHN BUCHANAN of Lardriſmore.

When the preſumptions of law, that claims affecting the minor's eſtate were purchaſed by the tutor out of the minor's funds, and that a tutor or curator, ante redditas rationes intus habet, *take place.*

MUNGO Buchanan of Tilliecheun died in the year 1708, leaving behind him two infant children, Robert and Elizabeth, mother to the purſuer, James Buchanan.

George Buchanan of Lardriſmore, grandfather to theſe children, took upon him the adminiſtration of their affairs, and acted as their tutor; but he neglected, during the whole courſe of his adminiſtration, to make tutorial inventaries of the effects belonging to his pupils; and his ſon William, who ſucceeded him in the management, never ſupplied his omiſſion, or made up any ſtate or inventary of the children's effects.

Robert, one of the pupils, died in the year 1723, before he arrived at the age of twenty-one; ſo Eliſabeth, mother of the purſuer, ſucceeded to the eſtate of her father. George and William Buchanans, who had acted as tutors to the children, in the courſe of their adminiſtration, had advanced conſiderable ſums for their pupils; and, in order to prevent the eſtate from being torn to pieces by the diligence of creditors, they paid off ſuch of the debts as were moſt preſſing, and took aſſignments from the creditors whoſe debts were ſo paid, in favours of William, that he might afterwards operate his payment from the eſtate of the minors, when their affairs came to be upon a better footing than they were when theſe debts were paid, and aſſignments taken.

The debts ſo paid were all preceeding the year 1708; but neither George, nor his ſon William, thought proper to put in any claim for the ſums ſo advanced by them, until the year 1732, when they prevailed with the purſuer to enter into a ſubmiſſion, by which his claims againſt them, on account of their tutorial intromiſſions, and the ſums due by them for his advances on their account, during their minority, were to be finally determined. This ſubmiſſion was conceived in general terms, and comprehended all clags and claims mutually ſubſiſting between the parties; but no particular debt or debts was there condeſcended upon, as being the principal ſubject of the arbitration. Upon this ſubmiſſion, however, no decreet-arbitral was pronounced; ſo matters remained in the ſame ſituation between theſe parties, they were in the 1708, down to the 1753, when William Buchanan above mentioned thought proper, for his own ſecurity, and to prevent preſcription, to conſtitute his debts, and afterwards to obtain decreet of adjudication; both of which were in abſence of James Buchanan, the defender therein, who was abroad in Jamaica

maica at the time, and who was afterwards adviſed to raiſe a reduction of theſe decreets of adjudication, upon the following grounds: 1*ſt*, That all the debts upon which the foreſaid adjudication proceeded were preſcribed, as it was not diſputed that they were contracted before the 1708, and the years of preſcription were more than run before the proceſs of conſtitution was brought in the 1753: That it is in vain for the defender to ſhelter himſelf under the ſubmiſſion of the 1732, as being a ſufficient interruption of the preſcription; for the ſubmiſſion was only general, and could operate no further than a ſummons, which was never held to interrupt debts not particularly libelled. But, 2*dly*, Even upon ſuppoſition that the debts were not preſcribed, it was *contended*, That the debts of Mungo, purchaſed by George and William during their curatorial management of the affairs of Mungo's infant children, could never be made the foundation of a claim againſt the purſuer, as coming in the right of theſe children.

That, when a tutor or curator acquires debts *durante tutela*, due by the minor, or any of his predeceſſors whom he repreſents, not only muſt the benefit from thence ariſing accreſs to the minor, but the law takes it for granted, that the money paid for theſe debts was advanced by the tutor out of the funds of his pupil. But, even upon ſuppoſition there was clear evidence that theſe debts had been acquired by George and William, with their own money, yet ſtill no action could lie at the inſtance of them or their repreſentatives, againſt the purſuer, as in the minor's right, becauſe they never accounted for their intromiſſions; and it is an eſtabliſhed rule in law, that it is not competent for a tutor to inſiſt againſt his pupil for any claims he may have againſt him, *ante redditas rationes*.

Before the tutor has rendered a full account of his intromiſſions, the preſumption of law is, *quod intus habet*, and that he is ſufficiently paid for his diſburſements out of the funds of the pupil, which he retains in his hands.

To theſe reaſons of reduction it was *anſwered*, on the part of the defender, John Buchanan, That the firſt reaſon of reduction, viz. preſcription, was ſufficiently obviated by the ſubmiſſion in the 1732, and by the vouchers and documents produced to the arbiters at that time; from which it plainly appeared, that the debts in queſtion were the ſubject of that ſubmiſſion.

As to the *ſecond* reaſon of reduction, inſiſted on by the purſuer, the defender *contended*, That the preſumption of law there founded on was not applicable to the preſent caſe; for that George and William were not, properly ſpeaking, tutors or curators, but only protutors or procurators; and that the law has no where ſaid, that the preſumptions eſtabliſhed againſt tutors and curators are to be extended to them. But, even upon ſuppoſition that the preſumption could be carried thus far, the force of it is intirely removed by what is inſtructed and proven to have been the ſituation of the minor's funds, which ſhow it to be abſolutely impoſſible, that the debts purchaſed by the defenders, and upon which the decreet of adjudication was obtained, were acquired by the funds of theſe minors. Mungo their father, by whom all theſe debts were contracted, lived in labouring circumſtances, and died overpowered with debt. His father's widow liferented the half of

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the eſtate, the whole rent of which extended only to the trifling ſum of four hundred pounds Scots, and ſubject to a feu-duty of two hundred and ten pounds Scots to the ſuperior. Mungo died before his mother a good many years; and, when the eſtate devolved upon the minors, it was burdened with the jointure of their grandfather's widow, and their own mother; ſo that, after payment of theſe burdens, it is evident, that their fund of ſubſiſtence would be extremely inconſiderable: Hence it appears altogether chimerical to aſſert, that the law, in ſuch a caſe, would preſume that the debts were purchaſed with the minor's funds.

With regard to the other preſumption, which operates againſt tutors claiming againſt the pupils, *ante reditas rationes*; it has been already ſhown, that the preſumption of *intus habere* cannot poſſibly apply to the preſent caſe, as there was no funds belonging to the minors with which theſe acquiſitions could be made: And, at any rate, any claim, at the purſuer's inſtance, againſt the defender, on account of his father or grandfather's intromiſſions, is intirely cut off by the decennial preſcription of tutors accompts. Neither was the force of this removed by the anſwer made to it by the purſuer, that, if the decennial preſcription operates againſt him, it muſt equally operate againſt the defender; for it ought to be obſerved, that the debts upon which the decreet of adjudication was pronounced did not ariſe from the balance of the tutorial accompts, but was compoſed of claims founded upon extraneous grounds of debt, and ſufficiently authenticated.

The court, in giving their opinions upon this cauſe, ſeemed to lay the principal ſtreſs of their reaſoning upon the proof that was brought of Mungo, father to the minor, being in labouring circumſtances, and having died in a condition not to pay his debt, and upon the exceſſive burdens which were proven to affect the eſtate during the minority of the pupils, and the adminiſtration of the defender's predeceſſors, which they ſeemed to be of opinion were ſufficient to elude the ordinary preſumptions in laws eſtabliſhed in ſuch caſes.

'The court repelled the reaſons of reduction; but found the defender 'liable to account for his predeceſſor's intromiſſions.'

A. C.

No. XVII. *June* 22. 1765.

NEIL Earl of Roſeberry;

Againſt

JAMES BAIRD, and other Creditors.

The act of parliament 1685 *was found to have retroſpect to entails, not only made, but compleated by infeftment, before the date of that act, and recorded in the regiſter of ſeiſines.*

THE predeceſſors of Neil Earl of Roſeberry executed an entail of the eſtate of Primroſe, which, in the ſubſequent tranſmiſſion of that eſtate to the ſeveral ſucceeding heirs, had been regularly recorded, with all its clauſes, of whatever kind, in the regiſter of ſeiſines. This entailed eſtate having come into the poſſeſſion of the preſent Earl, he was purſued by the creditors of his predeceſſors, notwithſtanding of the entail prohibiting the contraction of debt, as it never had been inſerted in the particular record eſtabliſhed for the regiſtration of tailzies by the act 1685.

In oppoſition to this claim, it was *pleaded* by his Lordſhip, That the act founded upon, in the ſame manner as every other law, could have no retroſpect, and was only intended to provide a remedy againſt future emergencies. He inſiſted too, that, though the houſe of Peers, in the caſe of Rothes, had declared, that the act 1685 was to regulate tailzies prior to the date of it; yet that the caſe itſelf, which was the foundation of that ſentence, explained the ſenſe in which it ought to be received. The tailzie, in the caſe of Rothes, was never compleated by infeftment; conſequently the decerniture of the ſupreme court could only have relation to tailzies in the ſame imperfect ſituation; but could never be intended to eſtabliſh a rule for thoſe upon which infeftment had followed, and which, like the preſent, were recorded in the public regiſter of ſeiſines, patent to all the lieges.

'The Lords found, That the tailzie was not effectual againſt the creditors, as it had not been recorded agreeable to the ſtatute.'

A. C.

Act. *Lockhart*. Alt. *Burnet*.

No. XVIII.

No. XVIII. *June* 25. 1765.

GEORGE DALZIEL;

Againſt

LOCHART of Cleghorn.

A ſum of money being allowed to a tenant for the reparation of houſes, it was found, provided the houſes were put in a habitable condition, that the tenant was not obliged to account for his diſburſements.

GEORGE Dalziel and Mr Lockhart of Cleghorn, having agreed about the conditions of a tack of certain lands belonging to the latter, one of which was, that a ſtipulated ſum ſhould be allowed to the leſſee, for the expences he might be obliged to throw out in the reparation of the houſes upon the farm. A proceſs being afterwards commenced upon the different conſtructions to be put upon the terms of the tack, it was found unanimouſly, that the maſter could not oblige the tenant to produce a particular accompt of the expences he had been at, provided he had fulfilled the terms of the tack, in properly repairing them, and putting them in a habitable condition.

Act. *Lockhart.* Alt. *Dundas* et *Wight.*

No. XIX. *June* 26. 1765.

ANDREW BEVERIDGE Precentor and Seſſion-clerk of Dunfermline;

Againſt

JAMES BAYNE and others.

Power of kirk-ſeſſions.

THE kirk-ſeſſion of Dunfermline, by an act 23d January 1681, ordained, 'That, whoſoever in that pariſh ſhould give up their 'names to be proclaimed for marriage, ſhould give half a dollar to the 'poor before their proclamation.' This act was renewed 8th November 1719, upon a narrative, that the cuſtom of paying the above ſum was much worn out.

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The purſuer, authorized by the kirk-ſeſſion, brought an action before the ſheriff, againſt the defenders, all diſſenters of different denominations, and moſtly ſeceders, for payment of this ſum, founding his claim upon the acts of the kirk-ſeſſion and uſe of payment. As to the laſt, the ſheriff allowed a proof to both parties. The purſuer limited his to the period from 1718 to 1738, *i. e.* from the date of the laſt act of the kirk-ſeſſion to the ſeceſſion. It appeared from the proof, that the uſe of payment had been pretty general, though not univerſal; that the kirk-ſeſſion, on account of the reluctance of the pariſhioners, had reſolved to accept what they would voluntarily give; that numbers had paid leſs than the half dollar, and many, though people of ſubſtance, had paid nothing.

The ſheriff having given judgment for the purſuer, the cauſe was brought into this court by advocation, and, after a hearing, was taken to report.

The purſuer *contended*, That, by common and univerſal cuſtom over Scotland, ſmall ſums, in ſome pariſhes more, in ſome leſs, were paid to the kirk-ſeſſion, for behoof of the poor, on occaſion of proclamation of banns for marriage; that the exaction of ſuch ſums had been authorized
1746. by a decree of this court, in a caſe between the kirk-ſeſſion and ſeceders in the pariſh of Falkirk, of which, as it is not in any printed collection of the deciſions, proof was produced in proceſs. The ſum here demanded is very moderate, but one half of what was found due in the caſe of Falkirk.

Anſwered for the defenders: This impoſition is illegal, irrational, and impolitic. *Illegal*, for kirk-ſeſſions have no power to impoſe taxes of any kind; *irrational*, being a conſtrained charity; *impolitic*, being a tax upon the marriages of the poor. That being the caſe, it cannot be ſanctified by uſe of payment, for any length of time. Beſides, the plea of immemorial uſe is excluded by the act of the kirk-ſeſſion 1719, as well as by the parole-evidence: That of Falkirk is but a ſingle caſe, and differenced from this, in that immemorial uſage was there proved. The purſuer's claim cannot be ſupported from the ſmallneſs of the ſum; becauſe, if the kirk-ſeſſion may impoſe half a dollar, there appears nothing to hinder them from increaſing the impoſition to what ſum they pleaſe.

'The Lords ſuſtained the defences.'

The purſuers libel alſo *concluded* for payment of certain dues to the kirk-beadles, on occaſion of marriages and baptiſms, founding this claim likewiſe upon an act of the kirk-ſeſſion, and immemorial uſage.

Argued for the defenders: Theſe dues are only paid as a recompence for the beadle's trouble in attending at marriages, when ſolemnized by the pariſh-miniſter, and for ſetting water, furniſhing clean towels, &c. at baptiſms, when adminiſtered in the pariſh-church; and, as the beadles are not put to this trouble by the defenders, they have no claim for the recompence. The act of the kirk-ſeſſion is no good foundation for this claim; for the ſeſſion have no power to impoſe taxes; neither can the purſuers derive any aid from common uſage in this caſe; on the contrary, that is in favour of the defenders, as hitherto theſe dues have been conſidered only as a recompence, and never exacted but when the ſervice was performed. They have never been exacted from any ſpecies

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of diſſenters through the kingdom; and, even when a perſon of the eſtabliſhed perſuaſion had occaſion to apply to the miniſter of a neighbouring pariſh for marriage or baptiſm, it was the beadle of that pariſh who got the dues, and not the beadle of the pariſh where the perſon reſided.

Anſwered for the purſuer: Kirk-ſeſſions are a part of the church-government, expreſsly aut' orized by law: As ſuch, they are entitled to have their proper officers, and to ordain for theſe ſuch dues and perquiſites as may ſeem reaſonable, in their reſpective pariſhes.

Whether the defenders are entitled to the benefit of the toleration, may be queſtioned. But, ſuppoſing they are, the law certainly never meant to tolerate them in with-holding of thoſe ſmall dues neceſſary for the preſervation of order, or the payment of thoſe officers which the conſtitution of the church, as by law eſtabliſhed, has found expedient and neceſſary.

This point was alſo ſtruggled by the ſeceders of Falkirk, in the caſe above mentioned, and determined againſt them.

'The Lords found the beadles entitled to the dues claimed by them.'

A. R.

Act. *Lockhart* et *Henry Dundas*. Alt. *Montgomery* et *Rolland*. Reporter *Kames*.

No. XX. *June* 27. 1765.

WILLIAM BUCHANAN;

Againſt

ANDREW DUNCAN Baker in Glaſgow;

Action refuſed upon a bill ſubſcribed by notaries, without witneſſes.

JOHN BUCHANAN, ſome time before his death, conveyed his whole effects to certain truſtees, for the purpoſes mentioned in the truſt-diſpoſition. Janet Macklum, his widow, the fulfillment of the obligations to whom made part of the truſt-deed, among other debts aſſigned to her by the truſtees, got a bill, accepted by Janet M'Farlane; the acceptance of which, as ſhe could not write, was, by her authority, ſigned by two notaries. Janet Macklum having execute a teſtament in favours of the purſuer, he brought an action againſt Andrew Duncan, the defender, as repreſenting Janet M'Farlane, in the character of a vitious intromitter.

Againſt this action, it was *contended*, on the part of the defender, That the bill was not good, being ſigned by notaries; and, even upon the ſuppoſition that a bill was valid when ſigned by notaries; yet the preſent was void, as there were no witneſſes to the ſubſcription of theſe notaries. That, in this country, there are only two methods of conſtituting a valid

obligation; either by a writing holograph of the party, or by a deed wrote by another, bearing the name of the writer and witneſſes, with the ſubſcription of the laſt. When the deed is not holograph, the party either can write, or cannot write. If the laſt is the caſe, then the law allows him to ſubſcribe by two notaries, ſpecially authoriſed, in preſence of four witneſſes, whoſe names and deſignations, with that of the writer, muſt be inſerted in the deed. But the bill in queſtion, though it could have admitted of theſe ſolemnities, is deſtitute of them all; and, therefore, it would be repugnant to the law of this country, were ſuch a deed to be found valid, in direct oppoſition to the moſt poſitive ſtatutory enactments.

As to the arguments advanced by the purſuer, concerning the uſage of almoſt all countries, relating to bills of exchange, and the particular indulgence every where ſhown them, to facilitate the operations of commerce, the purſuer muſt be pardoned for being of opinion, that, if the indulgence already given to bills of exchange were to be enlarged, conſequences would follow prejudicial to commerce itſelf, and hurtful to the ſecurity of private property, as new methods would then be furniſhed, by the interpoſition of notaries and other perſons, to create obligations, to which the perſons bound never gave their concurrence.

In anſwer to theſe arguments, the purſuer obſerved, that bills of exchange have always been privileged with an exemption from the ſtatutory ſolemnities requiſite in other deeds. Some ſmall inconveniencies, perhaps, may ariſe from this indulgence; but there, the national advantages derived to commerce, renders the other unworthy of obſervation. Holograph bonds do not prove their date, in queſtions with heirs or creditors; yet bills do; though it may be ſaid, that a perſon may antedate a bill, to avoid the effect of the act 1696, or to prevent the effects of an inhibition. This ſhows, that the arguments ariſing from the inconveniency attending the privileges granted to bills are inconcluſive, as that inconveniency is evidently diſregarded by the law itſelf.

Writing is now become almoſt univerſal, and few caſes can occur, when the aſſiſtance of others, on account of being otherwiſe, is neceſſary; and it would be extremely hard, if, in a caſe ſuch as the preſent, a bill ſigned by notaries was to be rejected, when it is offered to be proven, that the two notaries were at the houſe of Janet M'Farlane when the bill was accepted; that ſhe was heard frequently to acknowledge the juſtneſs of the debt, and her having authorized the notaries to ſign for her.

The ſtatute 1579 reſpects only deeds where witneſſes are required to the ſubſcription of the parties; but, in bills of exchange, this ſolemnity was never required. The ſubſcription of the notary comes in place of that of the party; and, if witneſſes are not required to the firſt, there appears no reaſon why they ſhould be neceſſary to the laſt.

The caſe of Dinwoodie, 28th of June 1737, is preciſely in point, where the court found a bill to be valid, though ſubſcribed by notaries.

The court ſeemed to be of opinion, that, if witneſſes had atteſted the ſubſcription of the notaries, the bill would have been good. And, as to the caſe Dinwoodie, it was obſerved, on the bench, that there were two witneſſes to the ſubſcription of the notary; notwithſtanding of which,

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the court firſt found the bill void, and its being afterwards ſuſtained, was chiefly on this medium, that the debtor was alive, and did not diſown his having authorized the notaries to ſign for him.

'The court ſuſtained the objections to the bill.'

A. C.

Act. *James Dundas.* Alt. *John Dalrymple.*

No. XXI. *July* 9. 1765.

KATHARINE STEWART;

Againſt

CHARLES M'FARLANE, &c.

A wife's intereſt in a bond when her husband dies before the term of payment.

JOHN M'FARLANE huſband of Catharine Stewart, of this date, lent the ſum of L. 100 Sterling to Hugh M'Farlane of Callichraw, for which he took a bond, in the following terms: 'I Hugh M'Farlane of 'Callichraw, grant me to have borrowed, and actually received, from John 'M'Farlane tackſman of the bridge of Mitchaell, the ſum of L. 100 Ster- 'ling, money foreſaid, is allenarly lent out for the uſe and behoof of 'Charles M'Farlane, ſon of Duncan M'Farlane in bridge of Mitchaell; 'and the intereſt of the ſaid ſum, at five *per cent.* is to be uplifted by the 'ſaid John M'Farlane, during his own lifetime; the foreſaid John M'Far- 'lane ſtill reſerving the management of the foreſaid ſum of L. 100, during 'his own lifetime or pleaſure, and to renew this bond as oft as needful, 'renouncing all exceptions and objections to the contrary. Which ſum of 'L. 100 Sterling, with the due and ordinary annualrent from the term 'of Martinmas laſt bypaſt, at which term the ſame was borrowed, not- 'withſtanding of the date hereof, to the term of payment underwritten, I 'bind and oblige my heirs, executors, ſucceſſors, and intromitters with 'my goods and gear whatſomever, thankfully to content, pay, and again 'deliver, to the ſaid John M'Farlane, his heirs, executors, or aſſignees 'whatſomever, and that upon the term of Martinmas next to come.' Feb. 11. 1763.

Of this date, being poſterior to the date of the ſaid bond, the ſaid John M'Farlane made a will, by which he appointed Duncan M'Farlane his brother-german, and father to Charles the defender, his executor, burdening him with payment of certain legacies to his friends, and, among others, with 2000 merks to Charles the defender; and further, he appointed him reſiduary legatee, directing his father, Duncan the executor, to pay to him whatever free ſubject there ſhould remain after clearing his July 5. 1763.

his debts and legacies in the will. It was likewiſe provided, that this will ſhould not prejudge the intereſt of Katharine Stewart my ſpouſe, in the ſubjects in communion between them.

John M'Farlane having died before the term of payment, his widow, the purſuer, brought an action againſt the defender for payment of one half of the ſum contained in the bond, as belonging to her, *jure relictae.*

Againſt this action it was *pleaded* for the defender, That, by the form of the bond, the money at John's death was not *in bonis* of him, but belonged to the defender: That it appeared from the narrative of the bond, that the money was lent out allenarly for his uſe; and, though the adminiſtration of it was reſerved to him, and the ſum taken payable to him, his heirs, or aſſignees; yet that could import no more than a power to alter, if he thought proper; which, if he did not do, the contents of the bond, in virtue of the narrative clauſe, became his property, immediately upon his uncle's death, without being accounted part of the defunct's moveables, ſubject to the adminiſtration of his executor, or the legal proviſions of his wife. As to the apparent contradiction between the narrative and obligatory clauſe in the bond, no weight can be laid upon this circumſtance, when it was conſidered, that there could be no dubiety as to the intention of the granter. The bond was wrote in the country, by Hugh M'Farlane the debtor, a man unacquainted with buſineſs; but the inaccuracy occaſioned by his ignorance will never be taken hold of to defeat the evident intention of the creditor.

It was *contended*, on the other hand, by the purſuer, That the bond was not of ſuch a tenor as to give the defender any right thereto, excluſive of the heirs and executors of the defunct. The obligatory clauſe is that only by which any obligation can ariſe, or any right be eſtabliſhed by a deed of this kind; and, though the narrative may contain and ſet forth what the creditor intended to do; yet the obligatory part was only to be regarded in determining the queſtion to whom the contents of the bond did belong. In this caſe, the money is expreſsly taken payable to himſelf, his heirs, and executors whatſomever; but even the narrative provides, that it ſhould be under his management during his lifetime or pleaſure. The purſuer always underſtood it as a rule, that, when there was a diſcrepancy between the narrative of a deed and the obligatory part, the queſtion behoved to be decided according to the laſt, as the *literarum obligatio* aroſe from this only, and not from the narrative, whatever it might contain concerning the intention of the creditor.

But, even ſuppoſing the bond ſo conceived as to give the defender a right excluſive of the executor; yet the intereſt of the purſuer could not be affected thereby; as, by her huſband's death before the term of payment, this bond, like his other moveables, remained *in bonis* of him, ſubject to her *jus relictae.* That this was abundantly evident from the obligatory part of it; and the narrative, at the moſt, can be conſidered only as a deſtination of ſucceſſion to Charles. Upon John's death, Charles could not validly diſcharge this bond; he could only have ſued the executor to confirm it, as *in bonis* of the deceaſed, and then either to aſſign it to him, or uplift the contents, and pay them over to him. It is indiſputable, that the *jus relictae* extends to all perſonal bonds bearing intereſt from their date; if the huſband dies before the term of payment,

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ſuch bonds have always been conſidered as ſimply moveable, before that period arrive. Neither could the deſtination of this bond ever be conſidered in the light of a ſpecial legacy to Charles; and, therefore, not revocable by a general teſtament; for the obligation in the bond itſelf is taken to the defunct's heirs and aſſignees, and the ſubſequent diſpoſition conveys every bond or ground of debt to Duncan, whom he had named his executor; which clearly comprehends the bond in queſtion, amongſt the other moveables belonging to him at the time of his death.

'The court found, That the purſuer's huſband having died before the 'term of payment of the bond libeled, ſhe hath right to one half 'of the principal ſum, intereſt, and penalty therein contained, *jure* '*relictae*, and remit to the Lord Ordinary to proceed accordingly; 'and, upon a reclaiming petition, adhered.'

A. C.

Act. *Rae* et *Burnet*. Alt. *Patrick Murray*.

No. XXII. *July* 9. 1765.

HOGG and Co.;

Againſt

HOLDEN.

Septennial preſcription of cautionry obligations.

HOGG and company, merchants in London, being creditors in certain ſums to Richard Holden, Abraham Holden his brother, wrote to them as follows: 'I am very much obliged to you for this, as well as former 'favours done my brother. For this L. 50 you have given your accept- 'ance, at ſix months date, I will ſee you paid, though he ſhould not re- 'turn; and, if you think a further acknowledgment or ſecurity requiſite, 'ſhall have it. I had a letter from him of the 24th laſt, wherein he in- 'forms me, that he had an opportunity to carry out goods to a pretty 'large value, and had applied to you, who was ſo good as to ſend him 'your acceptance for L. 50, at ſix months date, and propoſed to ſend 'you his will and power till he returned; however, though he ſhould 'not ſend it, I will ſee you paid.' Jan. 13. 1753.

In 1764, Hogg and company brought an action againſt Robert Holden, ſon and heir of Abraham, for payment of this ſum.

The defender *pleaded* the ſeptennial preſcription, upon the act 1695. c. 5.

Anſwered for the purſuers: The act gives the benefit of that ſhort preſcription to ſuch only, 'as are expreſsly bound for another as cau-

'tioners,

'tioners, or who have a clauſe of relief in the bond, or a bond of re-
'lief apart, intimated perſonally to the creditor at his receiving the
'bond.' As none of theſe is the caſe here, Abraham Holden was not a cautioner in terms of that ſtatute; and, therefore, the defender cannot plead the benefit of it.

Replied: The defender's father was ſtrictly and properly *a cautioner* for Richard. The letter founded on contains nothing that can import a *novatio* of the debt, or a freedom of the principal debtor from payment; on the contrary, Abraham binds himſelf only in caſe Richard ſhould fail to pay. The caſe appears extremely ſimilar to one collected by Lord Harcarſe, June 1661, Home *contra* Lockhart, No. CCXXXIV.; and another by Fountainhall, 20th January 1693; in both which, perſons bound much in the ſame terms with Abraham Holden were found to be cautioners not *expromiſſors.*

Duplied: It is unneceſſary to inquire whether Abraham Holden was properly a cautioner or not. It is certain, he was not a cautioner in terms of the ſtatute, which, being correctory, may not be extended beyond the words; *v.* More *contra* Forbes, 16th February 1710; Rutherford *contra* Scot, 9th February 1715; Blair *contra* Dempſter, 20th January 1747.

'The Lords found, That the action was not cut off by the ſeptennial 'preſcription.'

Act. *Dav. Graeme.* Alt. *John Douglas.* Clerk *Pringle.*

No. XXIII. *July* 10. 1765.

CARMICHAEL;

Againſt

PETER.

Warrandice from fact and deed.

CARMICHAEL let two ſhops in Edinburgh to James Cundel, for 13 years, after Whitſunday 1753, at L. 12 a-year; but, having afterwards made conſiderable improvements, Cundel engaged, verbally, to pay a certain additional rent.

In March 1761, Carmichael entered into a contract with Peter, by which, along with a contiguous cellar, he let the ſhops to Peter; the tack of the ſhops to commence at the iſſue of the leaſe to Cundel. At the ſame time, Carmichael aſſigned to Peter Cundel's tack; and upon the narrative that Cundel had engaged to pay of additional tack-duty, at the rate of 10 *per cent.* of the expence of the whole repairs, and that theſe had amounted to L. 133 : 15 : 0, he alſo aſſigned the 'foreſaid additional 'rent,

' rent, with all action and execution competent therefor'. The aſſignation to the tack, and agreement with Cundel, was warranted from fact and deed only.

Peter having demanded payment from Cundel, Cundel alledged, that his agreement with Carmichael was only to pay 8 *per cent.* of L. 50, without any regard to the amount of the expence.

Carmichael having ſued Peter for the ſtipulated rent, Peter inſiſted for a proportional deduction, unleſs the purſuer could eſtabliſh the obligation on Cundel, as ſet forth in the aſſignation. At the ſame time, Peter brought an action againſt Cundel, that Carmichael might have an opportunity of eſtabliſhing his bargain with him; but no proceedings were had in this action.

Anſwered for Carmichael: The aſſignation is only warranted from fact and deed; and therefore, unleſs the defender ſhall ſhew, that, by the fact or deed of the purſuer, the ſum in diſpute has been with-held from him, he cannot prevail in his preſent claim. If the defender ſhould prove, that the agreement with Cundel was as Cundel alledges, then he would be entitled to a proportional deduction; becauſe then it would appear, that, by the fact or deed of the purſuer, part of the ſubject had been evicted.

Replied for Peter: It is eſſential to the contract *locati*, that if the ſubjects let do periſh or fail, otherwiſe than by the fault of the leſſee, then the leſſee is no longer bound to pay the tack-duty, *l.* 15. *pr. et* § 1. *l.* 33. *ff. locati.* Dict. *v. periculum.* This is the caſe, though no warrandice at all be expreſſed. The purſuer is not only to be regarded in the light of cedent, but as leſſor. The aſſignation to the agreement with Cundel, was really a leaſe of the profits ariſing from that agreement; for which he took the defender bound to pay a higher rent. By the contract, even the aſſignation to the written tack with Cundel, is warranted from fact and deed only; but, ſuppoſe the ſhops were burnt or become ruinous, could it be maintained that the defender was notwithſtanding liable for the rent, becauſe this did not happen by the fact or deed of the purſuer?

The court was of opinion, That the purſuer was bound to make good his own averment; and therefore ' found the defender en-
' titled to retain the 10 *per cent.* in regard the purſuer had not pro-
' ved his alledged agreement with James Cundel.'

A. R.

Act. *M'Queen.* Alt. *Rae.* Clerk *Roſs.*

No. XXIV.

No. XXIV. *July* 17. 1765.

JAMES DOBIE;

Againſt

AGNES RICHARDSON.

In order to ſave the jus mariti *upon the diſſolution of a marriage within the year, not ſufficient that a child be born alive, unleſs it alſo be heard to cry.*

DOBIE's wife bore a child about nine months after their marriage, and died in child-bed. Agnes Richardſon, her ſiſter, immediately took poſſeſſion of all her moveable effects. Dobie brought an action againſt her, concluding for exhibition and delivery, and that ſhe ſhould hold compt and reckoning, and divide with him Mrs Dobie's effects, according to the preſcription of law.

The defender having alledged, that the child was ſtill-born, the cauſe went to proof. It appeared, that the child breathed, raiſed one eye-lid, and expired with the uſual convulſive agonies, about half an hour after its birth; but was not heard to cry.

The defender *contended*, That it was eſſentially requiſite that the child ſhould have been heard to cry, upon the following authorities; *Reg. Majeſt. l.* 2. *t.* 8. § 1.; *Leg. Burg. c.* 44. § 4.; *Balfour's Practics*, p. 100.; *Craig*, *L.* 2. *Dieg.* 22. § 41. 42.; *Stair*, *l.* 1. *t.* 4. § 19. *et l.* 2. *t.* 6. § 19.

Anſwered for Dobie: The object of the law is a living child. This is evident from the nature of the thing, as well as from the authors quoted by the purſuer, who, in general, ſay, only that it is neceſſary the child be born alive. Becauſe moſt children do cry immediately after their birth, an erroneous opinion ſeems to have obtained, that all children born alive do ſo; and hence that circumſtance has been mentioned as a proof of the child's life; but this is not to be underſtood ſo ſtrictly, as abſolutely to exclude other proofs by circumſtances equally pregnant and certain. —In treating of the law of death-bed, moſt of our authors mention the defunct's going to kirk or market as the only legal proof of his reconvaleſcence; yet Lord Stair gives it as his opinion, that a proof by equipollent circumſtances may be admitted; *l.* 4. *t.* 20. § 45.

To ſhew how abſurd a conſtruction ſtrictly literal were, in this caſe, the *Reg. Majeſt.* which was, no doubt, the original of all the other authorities quoted, requires that the child ſhould be heard to cry *within the four walls of a houſe*; but, if a child ſhould chance to be born in the fields, and be heard to cry there, could it be maintained that this ſhould have no effect?

Further,

Further, the quotations for the purſuer relate to the courteſy and terce; but the argument from them to the preſent queſtion is not concluſive; as they and the *jus mariti* ſtand on a different foot in ſeveral reſpects. The right to thoſe is only created by the birth of a child. The *jus mariti*, on the contrary, takes place immediately upon the marriage; but is reſolved by the diſſolution of the marriage within the year, without a living child; and there might be ſome reaſon for requiring more evidence to create a right, than to ſave a right already created.

Replied for the defender: Wherever the lawyers treat of the proof of the child's being born alive, they unanimouſly require it ſhould be heard to cry: And, as the ſigns of life may often be uncertain and equivocal, there is a manifeſt expediency in eſtabliſhing ſome certain criterion, and not leaving a matter of this kind to the opinion or judgement of witneſſes.

The *Regiam Majeſtatem* does indeed ſay, that the child muſt be heard to cry *within the four walls of a houſe*; but that addition appears only to be deſcriptive of what uſually happens; and beſides, there is no occaſion, in the preſent queſtion, to canvaſs whether that be neceſſary or not.

There is no foundation for diſtinguiſhing between this caſe, and that of the courteſy or terce. The lawyers have made no diſtinction. On the contrary, Balfour and Stair have expreſsly laid down the law in the ſame way as to both.

The Lord Ordinary found, 'That, as Mrs Dobie did not live year 'and day after her marriage, and as it was not proved, that the child or '*foetus* of which ſhe was delivered was heard cry, the purſuers claims on 'account of the marriage were reſolved.'

Upon a reclaiming bill and anſwers, 'the Lords adhered.'

A. R.

Act. *Armſtrong*. Alt. *Montgomery*. Clerk *Kirkpatrick*.

No. XXV. *July* 19. 1765.

WILLIAM REID, Merchant in Edinburgh, *ſupplicant;*

An action brought before the Court of Seſſion, againſt an Officer of the revenue, for a treſpaſs, cannot be ſtayed and removed into the exchequer by an injunction from that court.

MR REID, on the 15th of July, preferred a petition, ſetting forth, that, ſome time ago, he had erected at Woodhall, in the pariſh of Collington, a mill of a particular conſtruction, and his own invention, which manufactures tobacco into ſnuff with more expedition and leſs expence than ordinary milns do; for which reaſon, he had always been extremely anxious to keep the mechaniſm of this mill a ſecret.

That, on Friday the 5th of April laſt, ſome mill-wrights and ſmiths in Collington, along with ſome exciſe-officers, and a conſtable, forcibly en-

tered into the purſuer's mill, on pretence of ſearching for ſmuggled goods, but in reality, as he believes, to diſcover the machinery, the aſſiſtants to the officers of Exciſe being all tradeſmen ſkilled in works of this kind, and employed at another ſnuff-mill near Collington, belonging to Mr Gilleſpie, tobacconiſt in Edinburgh; and the petitioner never having given any reaſon for ſuſpecting that he concealed ſmuggled goods in his mill-houſe.

That the tradeſmen and officers above mentioned, after ſtaying as long as they thought proper in the petitioner's mill-houſe without finding any ſmuggled goods, retired; and the petitioner raiſed a ſummons againſt them before this court, concluding for damages and expences, which ſummons had not yet been called, the days of compearance not being run till the 17th current.

That, on the 10th current, the petitioner was ſerved with a writ from the court of exchequer, by which he is ordered to ſhow cauſe, againſt the firſt day of next term, (which is the 18th current), why the action he had brought before this court ſhould not be removed into the exchequer?

And he and his attornies are enjoined, in the mean time, to ſurceaſe all further proceedings before this court. This writ, it appears, was iſſued upon a motion from his Majeſty's Advocate, on behalf of his Majeſty and the perſons above mentioned, for whom the writ bears it was prayed, That the ſaid action 'might be removed from the ſaid court of ſeſſion 'into this court, and all further proceedings before the ſaid court of ſeſ-'ſion ſtayed.' And the petitioner was certainly informed, that a copy of his ſummons had been read in the court of exchequer.

That the petitioner thought it his duty to ſubmit, in this manner, to the conſideration of their Lordſhips, the competency and propriety of the ſaid motion and injunction. He was adviſed, that every action of debt, from whatever cauſe it ſprings, or againſt whatever perſon it is brought, is competent before the court of ſeſſion. And that, as his action againſt the above mentioned perſons concluded for damages and expences, on account of their having broke into his mill, it was evidently an action of debt, and conſequently competent before this court. Though it were true, as alledged by the perſons above mentioned, that they had acted in virtue of their office, and under the authority of a writ of aſſiſtants, that would not be juſt ground for the injunction. The officers of every court may be either tried criminally, or purſued civilly, before other courts than thoſe to whom they belong, for an alledged abuſe or exceſs committed by them in the execution of their office. The courts to whom they belong have no power of repledging them; nor have the officers any privilege of claiming an exemption from the juriſdiction of other courts. As to the writ of aſſiſtants, the validity and legality of it may very probably come to be canvaſſed in this action. As the petitioner is informed, the writ of aſſiſtants the perſons above mentioned had with them, was not a legal writ in terms of the ſtatutes authoriſing writs of aſſiſtants, and of the ſame tenor with thoſe in uſe to be granted in England, the law of which ought to regulate thoſe matters here, but a general and unjuſtifiable warrant. But, ſuppoſing that a formal declarator of the legality of ſuch writ would not be competent before this court; yet a queſtion as to its validity ariſing incidentally, and from the

the plea offered in defence, could not render the court incompetent to an action to which it certainly would otherwiſe have been competent; as it is eſtabliſhed law, that it is competent for courts to judge of points propoſed as a defence, to which they would not have been competent in an original proceſs.

That, ſuppoſing the petitioner's action to be altogether incompetent, the petitioner could not but doubt, whether the court of exchequer could remove it to themſelves, or ſtop procedure before this court by an injunction; as the court of ſeſſion is a ſupreme and ſovereign court, and as the perſons above named were commanded by the ſummons at his inſtance to appear before that court, they ought to have appeared, and, if adviſed that the court was incompetent, to have pleaded a declinature, which this court would have ſuſtained or repelled as it ſaw cauſe; and, if the defenders thought themſelves aggrieved, they had a remedy in the ordinary courſe of law, by an appeal to the houſe of Lords.

But, *ſeparatim*, the competency of the purſuer's action was put out of all doubt, by that part of his libel which alledged, that the defenders had broke open and entered his mill, not really from a ſuſpicion or information that ſmuggled goods were concealed in it, but with an intention to diſcover the ſecret of the machinery.

The petitioner therefore prayed their Lordſhips to take the premiſes into their conſideration, and to grant him ſuch relief as to them ſhould ſeem proper.

When this petition was moved, his Majeſty's advocate agreed to withdraw the motion in exchequer; upon which the court ſuperſeded adviſing the petition till that was done, and then pronounced an interlocutor finding the petition competent, and bearing the diſcharge of the motion.

J. M.

Pet. *M'Laurin. Croſby.*

No. XXVI.

JOHN and *WILLIAM HOWIES*, nephews and executors of the deceaſed *ROBERT POLLOCK*;

Againſt

MARGARET WYLIE, his relict.

Qualified Oath.

JOHN and William Howies, the nephews and executors of the deceaſed Robert Pollock, brought a proceſs againſt his relict before the commiſſary of Glaſgow, libeling, *inter alia*, that ſhe had, 'before and ſince 'her ſaid huſband's death, intromitted with, or uplifted and received caſh 'and other moveables which pertained and was owing to him, or in his 'cheſt or other repoſitories, at his death, to the value and extent of '2000 merks Scots.'

The

The defender having denied the libel as laid, the purſuers referred the ſame to her oath; and ſhe deponed, That 'the defunct, two or three 'days before his death, delivered to the deponent 24 guineas, and a piece 'of gold whereof ſhe knew not the value, and two crown pieces, and two 'or three half crowns, *all which he gave her in compliment for her own 'uſe.*'

Upon this, the commiſſary found the libel not proved, in ſo far as reſpected the 24 guineas and the gold and ſilver pieces. But, upon an advocation, Lord Alemoor Ordinary found, 'That it would be of dangerous 'conſequence to admit intromitters with the monies and effects of de-'ceaſed or dying perſons, to prove their title of intromiſſions by their own 'oaths; therefore, finds the defender, in this caſe, liable to account to 'the purſuers for the 24 guineas, piece of gold, crown pieces, and half 'crown pieces, mentioned in her oath.'

Margaret Wylie reclaimed, and *pleaded*, That the interlocutor proceeded upon a *petitio principii*; for the point *de quo quaeritur*, and referred to her oath, was, whether ſhe had any intromiſſion or not? Had the fact been eſtabliſhed, that there was a ſum belonging to her huſband, and that it had come into her poſſeſſion when he was dying, or after his death, the *ratio decidendi* might have applied; but the purſuer had no other way of proving *that there was an intromiſſion*, but her oath; and they accordingly did refer *ſimpliciter* to her oath, whether ſhe had intromitted with any money belonging to her huſband at or about the time of his death. Her depoſition reſolves into a flat denial of the fact. She does not admit, that ſhe had any intromiſſion with the money in queſtion as belonging to her huſband. She owns indeed, that this money was once in his poſſeſſion; but ſhe ſays, that he delivered it out of his own hand to her in a compliment, which is an expreſs denial of the fact alledged by the purſuers, viz. that, at or about the time of her huſband's death, ſhe intromitted with money of his, lying in his repoſitories. Had the purſuers proved *aliunde*, that the defender was in poſſeſſion of 24 guineas which had belonged to her huſband ſome days before he died, there might have been room for inſiſting, that the defence of donation was not proveable by her oath, or dangerous to admit it to be ſo; for, even in ſuch caſe, by the principles of law, the *onus probandi* ought to have been laid upon the purſuers; as it is an eſtabliſhed maxim, that moveables, or money in the poſſeſſion of any perſon, are preſumed to be his property, unleſs the contrary be proved. But, whatever might have been the determination in ſuch a caſe, where the only queſtion was as to the title of the defender's intromiſſion, it is plain, that the preſent caſe is totally different; for the purſuers pretend not to have any evidence, that the defender was poſſeſſed of money which had formerly belonged to her huſband. They referred the whole matter to her oath, and it reſolves into an expreſs denial of the libel; and the quality of donation is clearly intrinſic, being inconſiſtent with the fact alledged againſt her. If the quality of the oath be rejected, the whole muſt be rejected, and it muſt ſtill lie on the purſuers to prove, that ſhe is in poſſeſſion of 24 guineas which once belonged to her huſband. The deciſions proceed upon the principles maintained by the petitioner, *Dict. vol.* 2. from *p.* 295. to *p.* 299. And there was a late judgment very much in point, 21ſt November 1759, James Mitchel, *contra* Thomas Wright.

Anſwered

Anſwered for the Howies, The defenders oath would have been final and deciſive, had the point referred been, Whether or not the monies in queſtion were gifted to her by her huſband? But that was not the caſe; ſhe did not alledge ſuch gift in her defences, nor was it the ſubject of reference. It was the intromitting with, and having monies in her poſſeſſion that had belonged to her huſband, that was referred to oath. Intromiſſion is in effect acknowledged, but a quality adjected. And the preſent caſe is evidently a queſtion concerning the title of her intromiſſion, and whether ſhe can be allowed to prove the title of donation, in order to ſcreen her undue intromiſſion.

The principles upon which adjected qualities, in caſes *inter vivos*, are conſtrued to be intrinſic, do not apply to caſes of intromiſſion with the effects of a dying or dead perſon. In caſes *inter vivos*, the ſtrong preſumption that poſſeſſion preſumes property, gives the greateſt latitude to the oath of party, and credit to ſuch adjected qualities. A variety of ſuch caſes occur in that part of the Dictionary referred to by the defender. In theſe, the very nature of the claim proves a voluntary delivery by the proprietor of the effects to the party, which preſumes an abſolute tranſference of the property, unleſs the contrary be proved by oath. But this preſumption ceaſes in caſes of intromiſſion with the effects of perſons dead or a-dying. The law is juſtly jealous of ſuch intromiſſions; and it is of great moment, that the Lord Ordinary's interlocutor be followed as a rule, the conſequence of which will be no more than this, that none can have right to the effects of dead perſons, unleſs thoſe who have taken care to have a proper document, and practices againſt which the law has found it neceſſary to enact penal ſanctions, will thereby receive a more effectual check.

There is a deciſion which ſtrongly confirms the doctrine maintained by the purſuers, 29th November 1679, Irvine *contra* Kirkpatrick, obſerved by Stair, and thus abridged in the Dictionary, *vol.* 2. *p.* 298. ‘ But, as intromiſſion with a party's moveables after his deceaſe, will not ‘ be preſumed to be upon a title, becauſe poſſeſſion in that caſe does not ‘ preſume property, vitious intromiſſion being referred to a defender's ‘ oath, and he acknowledging that he got the goods from a third party, ‘ who had a diſpoſition from the defunct, the quality was not reſpected, ‘ ſeeing he did not produce the diſpoſition.’ Caſe of Wright, referred to by the defender, does not apply; for his oath was not in his own favour, but emitted by him *qua* depoſitary, with reſpect to the purpoſe of the depoſitation.

‘ The Lords altered the Lord Ordinary's interlocutor, and found the ‘ quality intrinſic.’

J. M.

Act. *Wil. Wallace.* Alt. *Ilay Campbell.*

No. XXVII. *Auguſt* 9. 1765.

The Merchant Company *and* Trades *of* Edinburgh;

Againſt

The Magiſtrates, Miniſters, *and* Council *of the* City *of* Edinburgh, *Governors of* Herriot's Hoſpital.

Who entitled to call the Governors of an Hoſpital to an account? Whether the Governors have power to feu out the Hoſpital's lands? Whether the Court of Seſſion may eſtabliſh rules for the future adminiſtration of the affairs of an Hoſpital?

1623. THIS hoſpital was endowed by George Herriot, for the maintenance and education 'of poor fatherleſs boys, the ſons of burgeſſes and 'freemen of the city of Edinburgh.' The magiſtrates, miniſters, and council of the city, were appointed '*feoffees of truſt*,' and '*ordained as* '*feoffees, to be governors of the lands, poſſeſſions, revenues, and goods of* '*the ſaid hoſpital.*' The funds were directed to be employed 'towards 'purchaſing certain lands in perpetuity, to belong unto the hoſpital.'

Lands were accordingly purchaſed at different times, the conveyances taken to the governors, as *feoffees in truſt in perpetuity*, for behoof of the hoſpital.

Several ſmall parcels of the hoſpital's lands had been feued out by the governors, both to individuals and the town of Edinburgh, under different conditions. In 1759, the town, in the view of forming a communication with the fields on the north ſide of the town, by a bridge over the North Loch, obtained a feu of 37 acres of the hoſpital-lands. The feu-duty was 5 bolls of barley; and, by the feu-contract, it was referred to certain perſons, what proportion of the profits that might ariſe to the city of Edinburgh, by means of this feu, ſhould be paid annually to the hoſpital?

This meaſure having appeared diſadvantageous to the hoſpital, the merchant company, and incorporations of the city, brought a proceſs againſt the governors, concluding, *inter alia*, to have it found that the governors had no power to feu the hoſpital-lands, or, if they had ſuch power, that it ſhould be put under ſuch limitations as might prevent its being exerciſed to the prejudice of the hoſpital.

The defenders *objected* to the title of the purſuers, upon the following grounds. 1*ſt*, It is an eſtabliſhed rule in law, That no perſon is entitled to found, either directly in an action, or by way of defence, upon any right that does not properly belong to himſelf, but to ſome third party. In the preſent caſe, the whole funds belonging to the hoſpital are, by the expreſs deed of the founder, deviſed to the magiſtrates and miniſters of the city as adminiſtrators. They are veſted with every right, and entitled to inſiſt in every action competent to the hoſpital. If the former adminiſtrators have tranſgreſſed their powers, and ſquandered or miſapplied the funds of the hoſpital, as the reparation is due, not to theſe purſuers, but to the hoſpital, ſo it is only the preſent adminiſtrators of the hoſpital who may call the former ones to account; as appears to have been done in a ſimilar caſe, Fountainhall 22d November 1698, Magiſtrates of Edinburgh, *contra* Binning.

2*dly*,

2*dly*, No perſon is obliged to anſwer as defender in any action, unleſs his obtaining an abſolvitor therein will give him the benefit of a *res judicata*, and effectually cover him from any future challenge upon the ſame grounds. But, as every private burgeſs has an equal right and intereſt to inſiſt in the preſent action with the purſuers, if it ſhould be found that theſe have a title, it will be impoſſible for the governors to be ſecure with regard to any act of adminiſtration, till they have ſtood a proceſs at the inſtance of every one diſcontented burgeſs in Edinburgh.

Anſwered for the purſuers: As the mortification is for the behoof of the children of burgeſſes and freemen of the city, the purſuers, whoſe families are to reap the benefit of it, have a manifeſt intereſt to take care, that the adminiſtrators do not either abuſe or exceed their powers. The preſent adminiſtrators may have a right to ſue for redreſs of wrongs done to the hoſpital by former adminiſtrators, but who are to call the preſent ones themſelves to account? The former ones loſe the character of governors with their office, and ſink into that of ſimple burgeſſes. The hoſpital-boys are pupils, when admitted and diſmiſſed before majority. The power given to biſhops and ordinaries, by the former law, is at an end by the abolition of epiſcopacy. To ſay, that the preſent adminiſtrators have the ſole right to call themſelves to account, or declare their own powers, is abſurd. The purſuers, therefore, as they have an evident intereſt, ſo they ſeem to be the *only* perſons who can inſiſt in this action.

The objection, That a decree *abſolvitor* could not give a *res judicata* to the defenders, is not concluſive. That inconveniency attends all popular actions, which however are known in the law of Scotland. Thus, every burgeſs may call the magiſtrates of his borough to account for their adminiſtration of the common good; Johnſton *contra* Magiſtrates of Edinburgh, 1735; Anderſon *contra* Magiſtrates of Renfrew, 30th June 1752, though in ſuch caſes the ſame objection might be made.

'The Lords ſuſtained the purſuers title to carry on this proceſs.'

II. *Queſtion, Whether the governors have power to feu out the hoſpital-lands?*

Argued for the purſuers: The defenders not being proprietors, but only *feoffees in truſt*, or adminiſtrators of the hoſpital's funds, cannot alienate or let in feu-farm, which is undoubtedly a ſpecies of alienation. The hoſpital-boys, being always either pupils or minors, the powers of the governors are ſuch as belong to tutors and curators. Such was the idea both of the Roman and Canon law; *L.* 32. *c. de Epiſc. et Cler. Voet ad Pand. tit. de reb. eorum qui ſub tutela, &c.* §. 17. *Lancilottus Inſtit. juris Canonici, L.* 2. *tit.* 23. §. 4.

2*dly*, By the expreſs will of the founder, the money beſtowed by him was directed to be employed, 'for and towards purchaſing lands in perpetuity, to belong to the hoſpital,' and 'the yearly value of the lands ſo purchaſed,' is appropriated for the maintenance of the boys; which evidently imports a prohibition to alienate the lands.

3*dly*, If the governors may let in feu-farm, and thereby convert the lands into feu-duties, they may alſo convert the feu-duties into a ſum of money; and of what dangerous conſequence this might be to the funds of the hoſpital, is obvious. In fact, ſome of the feuers have, by their

their contracts, an option to purchaſe part of their feu-duty at a certain rate.

Anſwered for the defenders: It is an eſtabliſhed maxim, That land-property muſt exiſt ſomewhere, nor is the caſe of communities any exception. The magiſtrates and other adminiſtrators are the repreſentatives of the community, and their deeds being conſidered as the deeds of the whole body, muſt have the ſame effect in law with thoſe of any ordinary proprietor. As to the preſent caſe, the defenders ſtand infeft in the lands in queſtion, upon the moſt ſolemn title of property known in our law, a charter of reſignation under the great ſeal, followed by infeftment, and confirmed by a Scotch Act of Parliament. If theſe titles were not ſufficient to veſt in them the feudal right and property, it would follow, that the lands have been in non-entry ſince the reſignation upon which the charter proceeded.

If the property be veſted in the defenders, they muſt have power to feu the lands of conſequence, unleſs they are reſtrained by the expreſs will of the founder, or by the nature of their office, as being *feoffees in truſt* for behoof of the hoſpital.

As to the will of the founder, the only thing inſiſted on by the purſuers is that, where he ordains the lands to be purchaſed *in perpetuity* to belong to the hoſpital; but this phraſe, which is uſual in deeds conceived in the Engliſh form, as Herriot's was, does not import, that the lands ſhould be unalienably annexed to the hoſpital. It anſwers preciſely to our common clauſe of ſtyle, *heritably* and *irredeemably*, or *in perpetuam remanentiam*, and denotes a perpetual, in oppoſition to a *temporary* or a *redeemable*, right.

Though the defenders are *feoffees in truſt* for behoof of the hoſpital, it does not thence follow, that they may not feu the lands. On the contrary, the univerſal cuſtom and opinion of the whole nation ſtands the other way. Magiſtrates of boroughs, maſters of colleges, and the adminiſtrators of all public ſocieties, are preciſely in the ſame ſituation. Yet they have been in the conſtant practice of granting feus, and thoſe feus have been univerſally acquieſced in. The King holds the crown-lands only as adminiſtrator for behoof of the crown; yet, before the act of annexation in the reign of James II. there was no doubt, that he might grant feus of any part of theſe lands. But, what approaches the neareſt to the preſent caſe is that of the church-lands before the reformation, which were veſted in the dignified eccleſiaſtics, only as adminiſtrators, for their reſpective benefices.

The defenders muſt indeed act for the benefit of the hoſpital; but no act of adminiſtration can be more beneficial than this of feuing out the lands. The revenue of the hoſpital is augmented from three, the former rent, to 5 bolls an acre, beſides a claim to part of the profits that may be afterwards reaped by the town. The revenue is likewiſe better ſecured by the advanced value of the ſubject. Indeed, this ſeems to be the only way the advantage belonging to the lands, from their vicinity to the city of Edinburgh, can be realiſed by the hoſpital.

Replied for the purſuers: The argument from the caſe of the magiſtrates of boroughs, &c. does not apply. All theſe are, in the eye of law, corporations, and, as ſuch, may have very conſiderable and extenſive powers; but Herriot's hoſpital is no corporation.

Duplied

Duplied for the defenders: It is apprehended, that the defenders titles above mentioned, are a virtual creation of them into a community, to the effect at leaſt of enjoying theſe lands; and, in fact, they have acted as a community for more than a hundred years paſt, without challenge.

'The Lords found, That the governors have power to feu out the 'land's belonging to the hoſpital.'

III. *Queſtion, Whether the court of Seſſion have power to eſtabliſh rules to be obſerved by the governors in granting feus? And, Whether theſe feus can only be granted* cauſa cognita, *and by authority of the court?*

Herriot, having by his will given power to Walter Balcanqual, dean of Rocheſter, to eſtabliſh ſtatutes for the adminiſtration of the hoſpital, he ordained, 'That the Chancellor, the two Archbiſhops, the Lord 'Preſident of the College of Juſtice, the Lord Advocate to his Majeſty 'of this realm of Scotland, for the time being, ſhall have full and 'whole power to interpret the ſame, and to determine all controverſies 'ariſing about the interpretation of the ſame: So that, whatſoever any 'three of theſe 5 met together, and all parties intereſted being convened, ſhall judicially or extrajudicially declare, in their conſciences, to 'come neareſt the true meaning of theſe ſtatutes, that, and nothing but 'that, ſhall be taken for the true meaning of the ſame, and in all points, 'without further ſcruple, be obſerved and followed.'

The purſuers *argued*, That, by this ſtatute, a power was given to theſe great officers to controul the governors; and that, as a quorum of them did not now exiſt, the powers originally given to them belonged to this court, as being a court of equity, and veſted with the ſame powers as the Roman Praetor and Chancellor of England.

They likewiſe *argued*, That, as the governors could only be conſidered in the light of tutors, ſo, at common law, they could not alienate, *niſi auctoritate judicis.*

Anſwered for the defenders: 1*ſt*, By the ſtatute quoted, no more was meant to be given to the officers therein mentioned, than a power to interpret the ſtatutes, in caſe any doubt ſhould ariſe as to their meaning. 2*dly*, Whatever were their powers, the court would not, becauſe of a failure of a quorum, aſſume theſe powers to themſelves, but authoriſe the remaining *nominees* to act as a quorum might have done, as in the caſe Campbell *contra* Lord Monzie, 26th July 1752. But, 3*dly*, The equitable powers of the court are, from their nature, confined to caſes of neceſſity. The preſent is none of theſe. There is no defect in the deed of mortification. The will of Herriot therein contained is compleat, and clearly expreſſed. It has been and may ſtill be carried into execution, without the intervention of any court whatever. The argument from the caſe of tutors does not apply. The defenders are proprietors of the lands in queſtion. Tutors are not proprietors; and, therefore, muſt of neceſſity have the authority of the court before they can alienate.

'The Lords aſſoilzied the defenders from this concluſion of the 'libel.'

A. R.

Act. *Sir D. Dalrymple*, et *alii*. Alt. *Blair*, et *alii*. *Roſs* Clerk.

No. XXVIII. *Auguſt* 10. 1765.

ROBERT SYME, Writer to the Signet;

Againſt

JAMES STEEL, Merchant in Edinburgh.

A proceſs with penal concluſions againſt a bankrupt, at the inſtance of his creditors, without the concourſe of the King's Advocate, not ſuſtained.

ROBERT Syme, writer to the Signet, as truſtee for the creditors of James Steel merchant in Edinburgh, inſiſted in a ſummons againſt him, narrating various acts of fraudulent bankruptcy, and concluding, That Steel ſhould be declared infamous, incapable of public office, and otherwiſe puniſhed, as alſo for L. 50 ſterling of damages.

Steel *objected*, That the action was abſurd and incompetent; becauſe, 1*ſt*, It contained very ſevere penal concluſions, and yet wanted the concourſe of the King's Advocate, who alone had a title to inſiſt *ad vindictam publicam*. 2*dly*, The accuſation ought to have been brought before the whole Lords by a complaint, and not before a ſingle judge by an ordinary action.

Syme *anſwered*, That ſeveral ſuch proceſſes had been ſuſtained; however, to prevent any doubt, he offered to amend his libel, by obtaining and adding the concourſe of the King's Advocate.

The Lord Ordinary allowed Syme to condeſcend on precedents; which he having failed to do, his Lordſhip took the cauſe to report; and the court was of opinion, that the accuſation could only be brought before the inner houſe by a complaint; that the King's Advocate was the only proper party to inſiſt for ſuch penal concluſions; and that it was abſurd to amend a libel by adding the name of the proper proſecutor; therefore,

The proceſs was diſmiſſed.

J. M.

Act. *Geo. Cockburn.* Alt. *M'Laurin.* Reporter, *Alemoor.* Clerk.

No. XXIX. *November* 1765.

ALEXANDER ALISON, deputy receiver-of Exciſe;

Againſt

Meſſrs *FAIRHOLMS* and *MALCOLM*, Bankers in Edinburgh.

A factor for an executor having lodged his conſtituent's money with a banker, in his own name, found, that after the factor's death, the money was not in bonis *of him, but belonged to his conſtituent.*

MR Aliſon, as executor of William Ruthven, granted a factory to John M'Laggan for diſpoſing of the executry-effects, paying the creditors, &c. M'Laggan, being clerk to Meſſrs Fairholms and Malcolm, lodged the proceeds of the executry with them at 4 *per cent.* entering the payments in the books, and taking the receipts in his own name. He had a ſalary of L. 50 from Fairholms and Malcolm, for which he kept a ſeparate accompt. He likewiſe owed them a ſum by bond, bearing 5 *per cent.* intereſt.

M'Laggan died before fully ſettling with Mr Aliſon, and, when there was L. 287 : 9 : 6 of the executry-money ſtill in the hands of the defenders; and, they having claimed compenſation or retention, on account of the debt due to them by M'Laggan, Mr Aliſon brought a proceſs, concluding to have it found, that the above ſum, being the proceeds of the executry-effects belonged to him, and, therefore, could not be applied towards payment of M'Laggan's debt.

The fact, that this money was the proceeds of the executry was very ſatisfyingly evinced. M'Laggan had no money of his own. He was not factor for any other perſon. His accompt with Fairholms and Malcolm, both in dates and in the ſums, to very trifling fractions, correſponded with his tranſactions as factor. There was beſides found in his cabinet at his death an holograph note, wherein, after ſtating ſome articles of charge and diſcharge reſpecting the executry, he drew out a balance againſt himſelf of L. 289 : 18 : 7, adding, 'whereof due by Fairholms and 'Malcolm L. 287 : 9 : 6.'

Argued for the defenders: Tho' it were certain that this money was the proceeds of the executry, that would not be ſufficient to infer the concluſion contended for by the purſuer. The law does not conſider money as a *corpus*. It is the property of him into whoſe hands it hath lawfully come. If it be the value of another perſon's effects, that perſon may be creditor to the poſſeſſor of the money, but he has no hypotheck over, or *real* and preferable right to, the money itſelf. If the poſſeſſor apply it to payment of his own debts, the debts will be extinguiſhed, and the money become the creditor's; or, if he beſtow it in the purchaſe of goods in his own name, theſe will belong to himſelf, not to the perſon from whom or on whoſe account he received the money. So it was found, Boylſton *contra* Robertſon and Fleeming, 24th January 1672, Stair.

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As M'Laggan was therefore proprietor of the money, ſo he lodged it with the defenders, not *factorio nomine*, but as his own. That being the caſe, an arreſtment in their hands by M'Laggan's creditors, while he was alive, muſt have been effectual. For the ſame reaſon the money muſt ſtill be conſidered as *in bonis* of M'Laggan, and cannot be taken up any other way than as executor-creditor to him. Had M'Laggan taken a bond for it in his own name, the defenders plea muſt have been admitted without queſtion. There appears no ſolid difference between that and the preſent caſe.

The purſuer's doctrine would lead to extraordinary conſequences, and the application of it would in many caſes be altogether impoſſible. Suppoſe one factor to twenty different perſons dies inſolvent, leaving a ſum in his cabinet, or in the hands of a banker, how would it be poſſible to aſcertain what part of this aroſe from the factor's intromiſſions with the reſpective eſtates of his conſtituents?

Anſwered for the purſuer: Whatever might have been the caſe, had the money been alienated either in the payment of debts or otherwiſe, no argument can thence be drawn to the preſent queſtion. Here the money was not alienated. On the contrary, M'Laggan gave the ſtrongeſt proof that he meant it ſhould not be applied for his uſe, by keeping a ſeparate accompt for his ſalary, and not bringing his bond to his debit in the executry-accompt, though that bore 5 *per cent.* the money in queſtion only 4. The executry-money was only *depoſited* in the defenders hands, that it might be ready when the exigencies of the factory ſhould require. It muſt therefore be conſidered as ſtill *in medio*, and being proved to be the proceeds of the executry-effects, muſt belong to the purſuer as the *ſurrogatum* of theſe. See Street, 9th June 1669; Hay, 15th March 1707; L Strathnaver, December 1731; Robertſon's creditors, 27th July 1757.

The caſe of Boylſton does not apply. It is thought of importance to commerce, to ſecure the current tranſmiſſion of property clear of any latent claims by third parties. In queſtions, with regard to perſonal rights and ſums of money, commerce is not concerned; Stair, *B.* 1. *tit.* 12. § 16.

Caſes may perhaps be figured where the application of this doctrine would be difficult or impoſſible; but that ought not to influence the judgment in this queſtion, where there is no difficulty; *L.* 162. *de R. I.*

Obſerved on the bench: That, if an executor take a ſecurity in his own name for the executry-money, it is held to be in truſt for thoſe intereſted in the executry; and, as M'Laggan was factor for an executor, the ſame rule ought to take place.

'The Lords repelled the defence of compenſation and retention pleaded for the defenders, and decerned againſt them for the ſums in their hands.'

A. R.

Act. *Rolland* et *Rae*. Alt. *Lockhart*.

No. XXX.

No. XXX. *January* 14. 1766.

ALEXANDER PIRIE, factor *loco tutoris* to *JAMES JUSTICE*;

Againſt

Mrs MARGARET MURRAY, and her tenants.

Tacks granted by a perſon whoſe liferent-infeftment was limited to a certain ſum, found good, notwithſtanding the lands yielded a greater rent than the ſum to which the right was reſtricted.

IN a contract of marriage entered into between Mr James Juſtice and Mrs Margaret Murray, Sir James, the father of Mr Juſtice, became bound to reſign the mains of Eaſt Crichton, and certain other lands therein mentioned, in favour of Mrs Margaret Murray in liferent, and warranted theſe lands to be worth 2000 merks of yearly rent. In this contract there was alſo a procuratory of reſignation, providing, that the lands over which Mrs Murray's liferent was conſtituted, ſhould be reſigned in her favour for new infeftment, ſo far as the ſame extended to her liferent-annuity of L. 100 ſterling. And it was alſo provided, that ſhe ſhould enjoy the full mails, profits, and duties of the ſame, in ſo far as might be extended to the foreſaid ſum of L. 100 ſterling. The contract contained likewiſe a clauſe of warrandice, whereby the lands were warranted free of all burdens whatſoever, in ſo far allenarly as might be extended to her yearly liferent above mentioned; and ſhe was likewiſe aſſigned to the rents of the ſame, in ſo far as might be extended to her liferent of L. 100 ſterling. This contract likewiſe concludes with a precept of ſeiſine preciſely in the ſame terms, and expreſsly reſtricting her right to L. 100 ſterling.

Some time after the marriage which followed upon this contract, the eſtate of Crichton was ſold, with the concurrence of Mrs Murray, and the lands of Juſtice-hall were purchaſed. The diſpoſition to theſe lands provided, that they ſhould pertain to Mrs Murray in liferent, and ſhould be in implement and ſatisfaction to her *pro tanto* of her liferent-proviſion of L. 100 ſterling.

This marriage was afterwards diſſolved by a ſentence of divorce, on account of the adultery of Mr Juſtice. In conſequence of which, Mrs Murray brought a proceſs before the court of Seſſion, for implement of the articles in her marriage-contract. The ſummons in this action libelled expreſsly for her liferent-annuity of L. 100 ſterling, and decreet was pronounced againſt Mr Juſtice preciſely in the ſame terms.

The lands of Juſtice-hall were a good deal ſhort of this proviſion, and Mrs Murray entered into a compoſition with her huſband's creditors, whereby ſhe accepted of the ſum of L. 367 ſterling in full of any claim ſhe could have for the yearly deficiencies of her jointure; by which compoſition, her right over the lands of Juſtice-hall came to be reſtricted to a certain ſum; whereas, before the date of this agreement, ſhe was entitled to the whole rents.

Mr Juſtice died without having appointed tutors to his ſon; and, in conſequence of an application to the court, Mr Pirie was named factor *loco tutoris*. Immediately after his nomination, he diſcovered, that the lands of Juſtice-hall would yield conſiderably more rent than Mrs Murray was entitled to draw in virtue of her liferent-proviſion; computing the compoſition ſhe had accepted from her huſband's creditors in place of its ſhortcomings. Upon which, he inſiſted in actions of removing againſt theſe tenants who poſſeſſed by tacks from Mrs Murray. In ſupport of this action, he *contended*, That Mrs Murray's right over the lands of Juſtice-hall, was reſtricted to a certain annuity by her contract of marriage in manner above mentioned. That, if ſhe had entered into no compoſition with her huſband's creditors, ſhe would have been entitled to draw the whole rents of theſe lands, as they could never have amounted to her proviſion of L. 100 ſterling. But, as ſhe had accepted of a certain ſum as the value of the inlakes of her proviſion, ſhe had no right to intromit with the rents, any farther than what would extend to her liferent-annuity, the compoſition for the ſhort comings being conſidered.

It was *contended*, on the other hand, by Mrs Murray, That, though the ſum ſhe was entitled to draw was confined to L 100 ſterling, and was expreſſed in her contract of marriage as a reſtricted liferent, and a liferent-annuity; yet her right was a locality, and her powers over the lands, in which he was infeft, as ample as thoſe of any proprietor. She likewiſe obſerved, that the aſſignation to mails and duties in her contract of marriage, impowered her to ſet, and raiſe tenants, uſe warnings, proſecute removings, and to do, during all the days of her lifetime, whatever her huſband or his father could have done.

'The court found the tacks granted by Mrs Murray were good, 'reſerving to the purſuer power to inſiſt, in caſe ſhe ſhould re-'ceive more rent than ſhe was entitled to draw.'

A. C.

Act. *Wight* et *Arch. Cockburn.* Alt. *Montgomery* et *Alex. Murray.*

No. XXXI. *January* 15. 1766.

KATHARINE DONALDSON, relict of *JOHN KEDZLIE*;

Againſt

GEORGE MURRAY.

What writing ſufficient to bar the triennial preſcription?

KATHARINE DONALDSON brought a proceſs againſt Murray for payment of L. 30 : 13 : 4 ſterling, as the price of malt delivered to him at different times, and, in proof of her libel, produced a writing in the following words. 'November 21ſt 1755, George Murray to Mrs Kedz-'lie, to 46 bolls of malt at different times, this day included, at 13 ſh. '4d. ſterling *per* boll.' This note was admitted to be holograph of Murray, but was not ſigned.

The

The defender pleaded the triennial preſcription; and *contended*, That the exception in the act 1579, *c.* 83. with regard to written obligations and a proof by writing after three years, could be underſtood of *probative* writings only; but that this note was not probative, and could not be conſidered in any other light than as an open account.

Anſwered, The effect of this preſcription is only to limit a proof by witneſſes, of which our law is particularly jealous. Hence it has been underſtood to apply to thoſe caſes where the creditor propoſes to prove the conſtitution of the debt by parole-evidence alone. But, where there is any writing under the hands of the debtor, though affording but preſumptive evidence of the debt, that has been thought ſufficient to entitle the creditor to a proof by witneſſes, if ſtill neceſſary, or to throw the *onus probandi* of payment upon the debtor, according to the degree of evidence which ariſes from the writing. It has never been thought neceſſary that this writing ſhould be ſtrictly probative, or ſuch as would be ſufficient *per ſe* to eſtabliſh the debt, or ſhow that it is ſtill reſting. Thus it was found, that a letter containing a general mandate for 'ſuch furniſhings as ſhould be neceſſary,' barred the preſcription, and entitled the creditor to prove by witneſſes, after three years, that furniſhings were actually made, 5th July 1681, Dickſon. The ſame effect was given to a letter acknowledging debt in general, 20th February 1708, Elliot. In neither of theſe caſes was the writing ſuch as to create a valid obligation, or *per ſe* to prove the furniſhings or debt purſued for. The note founded on in the preſent caſe being holograph of the defender, and found in the cuſtody of the creditor, appears ſuch proof that the malt was delivered to the defender, as even to ſuperſede the neceſſity of any further evidence.

'The Lord Ordinary, in reſpect the note was of the hand-writing of 'the defender, decerned for the ſum. Upon two reclaiming bills 'and anſwers, the Lords adhered.'

A. R.

Act. *Rae.* Alt. *Alex. Gordon*, Junior. *Home* Clerk.

No. XXXII. *January* 16. 1766.

JOHN BULLMAN, attorney;

Againſt

ALEXANDER EARL of *GALLOWAY*.

Attorney acting as a political agent, not entitled to a recompenſe for his trouble, without a previous bargain.

JOHN BULLMAN, as adminiſtrator of the late James Aitkenſon, attorney in Morpeth, brought an action againſt the Earl of Galloway and his ſon Lord Garlies, ſetting forth, That Lord Garlies having, in ſpring 1760, offered himſelf as a candidate to repreſent the borough of Morpeth

Morpeth in parliament, he and his father had employed the late Mr Aitkenſon, attorney there, to manage the election, as was vouched by many letters from them to him, which he acordingly did, with great zeal and ability, and the wiſhed for ſucceſs; and, therefore, concluding for L. 500, as a recompenſe to Mr Aitkenſon, who had dedicated his whole time to that buſineſs, from June 1760, to April 1761.

Pleaded in defence: Though Mr Aitkenſon's activity and addreſs were of great uſe to the defenders, yet there was no foundation for this action; Mr Aitkenſon was not even employed as an attorney, nor had he acted as ſuch. A noble family in the neighbourhood of Morpeth had long had the command of that borough; but, at laſt general election, an oppoſition was formed, into which Mr Aitkenſon keenly entered. His conduct proceeded, or muſt be preſumed to have proceeded, from public ſpirit or political views; and, he could no more have claimed a pecuniary recompenſe from the defenders, than any other perſon who exerted himſelf and his intereſt in their behalf on the occaſion. A political agent can have no claim for ſuch recompenſe without a previous bargain, except as to his deburſements; what Mr Aitkenſon laid out, has been paid to the purſuer a year ago, when he ſettled accompts with the defender, which ſhews his then ſenſe of the matter, and was a virtual diſcharge; and Mr Aitkenſon never made any demand for a conſideration for himſelf, nor did he make any entry in his books as if any ſuch had been due him; all he expected was, that Lord Garlies would uſe his intereſt to procure him an office in chancery.

The court was clear, that a political agent has no claim to a recompenſe for his trouble, without a previous bargain; and therefore,

'The Lords ſuſtained the defences, and aſſoilzied.'

J. M.

Act. *Dav. Dalrymple.* Alt. *Rae.*

No. XXXIII. *January* 29. 1766.

JOHN MURDOCH, Merchant in Glaſgow;

Againſt

SAMUEL CHESLIE, Merchant in Glaſgow.

Infeftment taken on a procuratory of reſignation which had formerly been executed, null.

BY contract of marriage, in 1688, between John Herbertſon, the eldeſt ſon of George Herbertſon, merchant in Glaſgow, and Janet Bell, George Herbertſon the father, diſponed certain tenements in Glaſgow, to his ſaid ſon and ſpouſe in conjunct fee and liferent, and to the heirs and bairns of the marriage in fee.

Upon the procuratory of reſignation contained in this marriage contract, John and his wife were infeft in 1694; and, upon this title, John, after his father's death, poſſeſſed theſe tenements till his own death, which happened in 1722.

John

John Herbertſon, of his marriage with Janet Bell, had a ſon named John, and ſeveral younger children. Upon the death of John the father, John, the ſon, ſerved himſelf heir in general to his father, and thereafter cauſed reſignation to be made by the procurator of George, his grandfather, in the hands of the magiſtrates of Glaſgow, his ſuperiors; and upon this reſignation he was infeft in 1723.

John the father, and John the ſon, had both contracted conſiderable debts, upon which the creditors led adjudications. Againſt John the ſon, two of theſe adjudications were led by Samuel Cheſlie, and two by John Murdoch.

Cheſlie's adjudication proceeded againſt John the ſon, without any ſpecial charge to enter heir to his father.

Murdoch's adjudication proceeded upon ſpecial charges againſt John the ſon to enter heir in ſpecial to John the father, and to procure himſelf properly infeft as ſuch.

When theſe creditors came to be ranked, it was objected by Murdoch, againſt Cheſlie's adjudication, that, as the infeftment of John the ſon had proceeded upon the procuratory of reſignation granted by George the grandfather in his ſon John's contract of marriage, which procuratory had already been executed in the perſon of John the father, it could not again be executed by John the ſon; and conſequently the infeftment in favours of John the ſon, proceeding on ſaid procuratory of reſignation, was void and null, and of courſe the adjudication led by Cheſlie muſt be void, as not proceeding upon a ſpecial charge.

Anſwered for Cheſlie: This is too critical an objection to be laid hold of to void the diligence of a lawful creditor. Suppoſing the infeftment of John the ſon to have no ſupport from the procuratory of reſignation, the infeftment itſelf was neither irregular nor improper, but ſuch as the magiſtrates were bound to grant, not only in reſpect of the notoriety of John being his father's eldeſt ſon, and conſequently his heir general, and of line, but more eſpecially in reſpect of his general ſervice, *tanquam legitimus et propinquior haeres* to his father; and as the bailies could have been compelled to grant ſuch infeftment, the ſeiſine could not be cut down; becauſe the infeftment alſo proceeded upon the reſignation in the contract of marriage, as ſuppoſing it not to have been properly executed before; *ſuperflua non nocent, et utile per inutile non vitiatur.*

In ſupport of what was pleaded for Cheſlie, the following authorities were cited: Lord Bankton, *vol.* 1. *B.* 2. *tit.* 3. § 7. Renton *contra* feuers of Couldinghame, 20th Jan. 1666; Livingſton *contra* Menzies, 22d Jan. 1706; and Bell *contra* Carruthers 21ſt June 1749.

For Murdoch, the deciſions Edgar *contra* Maxwell, 21ſt July, 1738; Marquis of Clydeſdale *contra* the Earl of Dundonald, 26th Jan. 1726; and Landells *contra* Landell, 12th June 1752, were referred to.

'The Lords found the infeftment of John the ſon void, and preferred 'Murdoch.'

A. E.

For *Cheſlie*, *Lockhart*. For *Murdoch*, *Jo. Dalrymple*.

No. XXXIV. *March* 5. 1766.

JOHN CHALMERS

Againſt

MARGARET OLIPHANT.

Neceſſary to produce the grounds of debt, though poſſeſſion had upon an adjudication for more than forty years.

ALEXANDER BLACK, having bought a quantity of grain from Durham of Largo, Largo, in 1701, adjudged for the price a tenement in the Potter-row, belonging to Black. No charter or infeftment followed; but poſſeſſion was taken in 1713, and continued till the commencement of this action beyond forty years.

Jean Black, grandchild of Alexander, having granted a truſt-bond to John Chalmers, he raiſed a ſummons of adjudication. Compearance was made for Margaret Oliphant, who had acquired right to Largo's adjudication, and, with the decreet, was produced the contract for the corn, but no receipts to prove the delivery.

The purſuer *objected*, That the adjudication was null, as there was no evidence of the debt.

Anſwered, Had no poſſeſſion followed, the objection would have been good; for then the adjudication could be conſidered as a ſtep of diligence only; but, when poſſeſſion has followed upon it for more than forty years, it falls to be regarded as a title-deed, and all challenge is cut off by the negative preſcription.

Replied, A right to heritage cannot be loſt by the negative; it muſt be acquired by the poſitive preſcription; and there is no place for that without charter and infeftment. A decreet of adjudication is no more than a legal conveyance in ſecurity of the debt; and therefore muſt be ſupported by production of the grounds of debt, though poſſeſſion has been had upon it for ever ſo long a time.

'The Lords found it was incumbent on Oliphant to produce the 'grounds of her adjudication.'

A. R.

Act. *Wight*. Alt. *Swinton*, Junior. *Home* clerk.

No. XXXV. *March* 7. 1766.

CHRISTIANA CHALMERS,

Againſt

JAMES YOUNG, merchant in Stromneſs, and *INNES* and *HOPE*, merchants in London.

Mandate.

THE purſuer being entitled to ſome wages and prize-money, in right of a ſon deceaſed, applied to Young for advice how ſhe might recover it. Young having made her grant a power of attorney to

to Meſſrs Innes and Hope, tranſmitted it with a letter, containing aſſurances that they ſhould be indemnified of any expence that they might be put to. Innes and Hope having recovered the money, and placed it to the credit of Young, who was their debtor, the purſuer firſt brought an action againſt Young; but afterwards calling Innes and Hope, inſiſted againſt them only for payment.

Argued for Innes and Hope, They were Young's mandataries, he the the purſuer's; and it is to their employers only they are reſpectively accountable. It was from their knowledge of Young's circumſtances and character, and his aſſurances of indemnification, that they were induced to accept of the commiſſion: Of the purſuer they knew nothing but the name; and, had ſhe herſelf tranſmitted the power of attorney, they would not have taken any concern in it. It is true, the power of attorney was from her to them; but this was only as a neceſſary piece of form, which could not, nor was meant to affect the real tranſactions of the parties, and the conſequential obligations upon them. It is the univerſal practice of merchants to ſettle with the perſons who employ them; and it would be a great hardſhip upon individuals, as well as a great embarraſſment upon mercantile buſineſs, if they ſhould be ſubjected to ſecond payment to perſons with whom they had no connection.

Anſwered for the purſuer: The only mandate in this caſe was the power of attorney granted by the purſuer to Innes and Hope; ſhe therefore was their employer. Young was no more than the hand that tranſmitted the mandate; he indeed recommended Innes and Hope; but, if one were to be liable for the debts of thoſe who might chance to recommend one to another in the way of trade, the conſequences to commerce would be much more fatal than any that might attend the doctrine of the defender.

'The Lords, in regard the purſuer's power of attorney was a direct 'commiſſion to Innes and Hope to levy her ſon's wages, which 'commiſſion they accepted of upon recommendation of Young; 'therefore find, that Innes and Hope are accountable to the pur-'ſuer, without prejudice to them to claim a full indemnification 'from Young, in caſe they ſhall make it appear, on accounting with 'him, that he was in caſh to pay this demand.'

A. R.

Act. *Oliver*. For *Innes* and *Hope*, *Arch. Cockburn*. *Pringle* clerk.

No. XXXVI.

No. XXXVI. *June* 13. 1766.

ALEXANDER MUDIE,

Againſt

JOHN OUCHTERLONY.

A verbal Mandate, or Commiſſion, for purchaſing an heritable Subject probable by witneſſes.

PATRICK SPINK, proprietor of ſome tenements in the borough of Aberbrothock, having ſettled in Jamaica, granted a factory to John Wallace merchant in Aberbrothock, with ſpecial powers to him to ſell and diſpoſe of the ſubjects belonging to Spink in ſaid borough.

Mr Wallace expoſed the ſubjects to ſale in different lots by way of public roup; and Mr Ouchterlony having given Alexander Mudie a verbal order or mandate to purchaſe one of theſe lots, Mudie accordingly purchaſed it for behoof of Ouchterlony.

Theſe ſubjects were ſold in April 1762; but, owing to the diſtance of Spink's reſidence, and other accidents, no proper diſpoſition or conveyance was obtained from him to the purchaſers before January 1764.

In this interval, Ouchterlony repented of the bargain, and refuſed to accept of the conveyance to the ſubject, or to pay the price.

Wallace, the expoſer, brought an action before the ſheriff againſt both Mudie and Ouchterlony. Mudie having no defences, allowed decreet to go againſt him. Ouchterlony appeared by a procurator, and pleaded, 'That he was no party in the roup, nor offered at the ſame.' And, as Wallace had got decreet againſt Mudie, he appears to have inſiſted no farther in his action againſt Ouchterlony.

Mudie afterwards brought a proceſs in his own name againſt Ouchterlony before the ſheriff, ſetting forth, that he, Mudie, had been found liable as purchaſer, and concluding, that Ouchterlony ſhould be decerned to relieve him of the price. Ouchterlony happening to die ſoon after this proceſs was brought, Mudie brought another proceſs againſt Ouchterlony's repreſentatives.

In this action, Ouchterlony's repreſentatives *pleaded*, That the mandate, or commiſſion, alledged to have been given by their father to Mudie was only probable *ſcripto vel juramento* of the mandant, and that a proof by witneſſes could not be allowed. The ſheriff found a proof by witneſſes not competent, and aſſoilzied. Mudie advocated the cauſe, and gave in a condeſcendence of facts, which he offered to prove, importing, that Ouchterlony had, after the roup, acknowledged the purchaſe to be made for him; that he had intromitted with the rents; that he had cauſed repair the tenements purchaſed; and that he had ſet them to tenants poſterior to the roup.

Ouchterlony's

Ouchterlony's repreſentatives did not explicitly deny theſe facts, but contended they could not be admitted to proof. The Lord Ordinary refuſed to allow a proof by witneſſes; and Mudie reclaimed to the court.

Pleaded for Mudie: The ſtatute 1696 does not apply to this caſe, as he Mudie, not Ouchterlony, was the truſtee in this matter; and, though there might be a doubt, whether Ouchterlony could have proved this truſt againſt Mudie, otherwiſe than by writ or reference to oath, it will not follow that Mudie is not at liberty, by every competent mean of proof, to eſtabliſh the mandate he received from Ouchterlony, to make the purchaſe for his behoof; and ſo was determined in the caſes Tweedie *contra* Loch, Skene *contra* Balfour, Ramſay and Rigg *contra* Maxwell, all lately under the conſideration of the court. And the principles of the civil law, under the title *De Mandato*, is perfectly agreeable to theſe deciſions.

Anſwered for Ouchterlony's repreſentatives: Mandates or commiſſions are commonly given in writing: This practice proceeds from the general ſenſe of the law: Mandates are only probable by writ or oath. And it is conſiſtent with reaſon they ſhould be ſo, as the terms of a verbal commiſſion, like a verbal promiſe, may eaſily be miſtaken by witneſſes, and proof of mandates has been often limited to writ or oath, long prior to the act 1696, particularly in theſe caſes obſerved by Dury, 13th February 1634, *contra* 28th November 1634, Brown *contra* Hamilton; and 16th June 1688, Laing *contra* Vauſs: That, whether Mudie or Ouchterlony is to be conſidered as the truſtee, makes no diſtinction in the preſent caſe, as the intention of the legiſlature, by act 25th 1696, could not be to give a benefit to the truſtee, which it denied to the truſter; and, if writ or oath only could prove the truſt againſt the one, no other mean of proof can be competent againſt the other.

'The Lords remitted to the Lord Ordinary to allow a proof.'

A. E,

For *Mudie*, *Lockhart*. For *Ouchterlony*, *D. Rae*. *Clerk*.

No. XXXVII. *June* 13. 1766.

JAMES WEEMYSS Goldſmith in Edinburgh;

Againſt

JOHN M'NAUGHTON, Eſq; Inſpector General of the Cuſtoms.

Action refuſed on a bill which had lain over twenty-five years, the accepter alive.

IN July 1739, Mr M'Nauchton accepted a bill to Thomas Erſkine for L. 25 Sterling, payable two months after date. This bill Mr Erſkine indorſed to James Moncrief, who indorſed it to Mr Weemyſs; who, in 1765, brought an action againſt M'Nauchton for payment of the bill.

The queſtion came before Lord Pitfour, who made aviſandum to the court, and appointed informations.

Pleaded for Weemyſs the purſuer: By the common law of the country, there is no ſuch thing as preſcription known. Every right, legally conſtituted, ſubſiſts forever; but as, in proceſs of time, this unlimited indurance of rights or obligations was found to be attended with many inconveniencies, the exception of preſcription was introduced by the act 1469, whereby an action not exerciſed, for the ſpace of 40 years, was elided; and afterwards the legiſlature thought it expedient, by ſpecial ſtatutes, to introduce ſundry ſhorter preſcriptions, as the triennial preſcription of accounts, the vicennial preſcription of holograph writs, &c.

But there was no ſtatute limiting the preſcription of bills, which muſt therefore ſubſiſt for 40 years. In ſome caſes, it is true, the court has refuſed action on bills that have lain over for a ſhorter time; but ſuch deciſions proceeded always upon the preſumption of payment, and not upon the footing of preſcription. And the purſuer alledged, that there was no room for preſuming payment in this caſe, as the accepter himſelf was alive, and did not condeſcend upon any particular time or place when payment was made.

Anſwered for M'Nauchton the defender: That, though no particular law has, in this country, limited the preſcription of bills to a ſhort indurance, yet the court has been conſtantly in uſe of denying action upon them after a long taciturnity; which appears agreeable to Lord Stair's opinion, titled *Probation by writ*; and Lord Bankton, treating of bills of exchange; and ſundry deciſions were referred to, where the court had refuſed action upon bills, that had lain over for a number of years, though not near the years of the long preſcription; and, from theſe authorities

thorities and deciſions, the defender pleaded that the taciturnity alone was ſufficient to cut down the bill.

He acknowledged, that, in 1739, he borrowed L. 25 Sterling from Sir Charles Erſkine of Cambo, and gave a bill for that ſum to Sir Charles and his brother Thomas, then Sir Charles's factor, and from Thomas he received the money, and to him the bill was delivered; but, he alledged, that, when the bill fell due, he repaid the money to Sir Charles upon a receipt, but which receipt was not produced. And he farther contended, that he had been always in eaſy circumſtances, and no demand ever had been made for payment of this bill, although Mr Erſkine the drawer lived in the neighbourhood, and was in very ſtraitened circumſtances.

'On report of Lord Pitfour, the Lords find no action lies on the bill 'in queſtion; and therefore aſſoilzie and decern.'

And refuſed a reclaiming petition for Weemyſs without anſwers, reſerving to him to inſiſt for M'Nauchton's oath, if he thought proper.

A. E.

For *Weemyſs*, *And. Croſbie.* For *M'Nauchton*, *Jo. Monro.* *Clerk.*

Reporter, Lord Pitfour.

No. XXXVIII. *June* 14. 1766.

ROBERT DEWAR;

Againſt

PATRICK MILLER, and Meſſrs Gibſon & Balfour Merchants in Edinburgh.

The acting Partner of a company by a bill, under the firm of the company, for money borrowed, binds the company.

JOHN WEIR, Patrick Miller, and Meſſrs Gibſon & Balfour entered into a co-partnery, principally for carrying on the linen trade, by the firm of John Weir and Co.

This branch of buſineſs was carried on under the management of Weir, who, as manager, was to have a certain allowance excluſive of all charges. The capital ſtock of the Co. was to extend to L. 2400 Sterling, one half to be advanced by Weir, a fourth by Miller, and the other fourth by Gibſon & Balfour.

In

In December 1764, Robert Dewar glazier in Edinburgh gave John Weir L. 160 Sterling, for which he received a bill, payable ſix months after date, accepted by Weir under the company's firm.

In May 1765, before this bill was payable, Weir ſtopped payments; and Dewar, being about to charge the other partners for payment of his bill, was ſtopped by a ſuſpenſion preſented in their name, which was remitted to Lord Kames to diſcuſs the reaſons on the bill; and his Lordſhip, on the 22d January 1766, 'Having conſidered the 'contract of co-partnery, by which no power was given to Weir, 'the managing partner, to borrow money, but only to buy and ſell; 'and, having alſo conſidered the condeſcendence of the bills accepted by 'Weir, under the firm of the company, which bills appear all to be for 'goods purchaſed by Weir for the company; finds that the defenders 'are not liable for payment of the bill in queſtion.'

Dewar reclaimed to the court, and pleaded, That, where ſtocks are ſmall, and buſineſs complicated, companies were neceſſary, and ſuch is the caſe in Scotland: That, in practice, money borrowed by one of the partners, and he giving a bill, under the firm of the company for the ſame, ſuch bill paſſes by indorſation in the ſame manner, as the bill of any known and reputable merchant, the perſon into whoſe hands ſuch bill comes, truſting, not to the credit of the accepting partner, but of the whole company.

That, be the purpoſe of the co-partnery what it will, this is the manner univerſally practiſed in borrowing money by companies upon bill: In the linen trade large ſums of money were required; and Weir, as the acting partner, was the proper perſon for borrowing the money, neceſſary for the company's behoof, under the firm of the company: That, in the event of the bankruptcy of an acting partner, to throw the loſs upon thoſe who contracted with the company, by means of ſuch partner, would at once put an end to all credit in Scotland; as, empowering ſuch partner to act in name, and under the firm of a company, implies a power, in that partner, of binding the company; and it was the buſineſs of the other partners to ſatisfy themſelves of the knowledge and integrity of their acting partner, before they truſted him with their firm; and, if they had not done ſo, they muſt ſuffer by the conſequences.

That, in lending his money to Weir, on a bill, under the firm of the company, Dewar did not truſt to Weir's credit, but to that of the company; and, accordingly, took his ſecurity under the firm of the company, of which Weir, as the acting partner, was poſſeſſed.

The contract of copartnery was not regiſtered; Dewar neither could nor did know any of the particulars contained in it; and, although he had known the particular tenor of this contract of co-partnery, yet all the partners would be liable to him in payment of the bill accepted by *John Weir and company*, as it was an expreſs article in the co-partnery contract, 'That 'the ſaid trade and buſineſs ſhall be carried on, and managed by the ſaid 'John Weir, in the name, and by the firm of John Weir and company;' and, in fact, it appeared that Weir was in the conſtant uſe of accepting bills for the company's behoof, under the firm of the company; and,

by

that theſe bills, paſſed from hand to hand by indorſations, were retired by the company, and conſidered by every body in the ſame manner as the bills of any other company or merchant in good credit.

Anſwered for Miller, Gibſon & Balfour: That none of them were engaged in any general trade or co-partnery with Weir: Their connection with him was confined to the linen trade: They did not diſpute but Weir was in the practice of accepting bills under the firm of Weir and company, and that they were in the practice of honouring theſe acceptances; but ſuch bills were all granted relative to the co-partnery buſineſs, in managing of which, Weir, as acting partner, muſt neceſſarily grant acceptances for the value of goods bought for behoof of the company; but they contended that Weir was not in uſe of borrowing money for the company, or giving bills for the ſame; nor did ever any of the partners honour any bills accepted by Weir for borrowed money, or upon any other account than for the price of goods bought for the company's behoof: That Dewar did not alledge he had ever dealt with the company in the way of their copartnery-buſineſs, or ever furniſhed them with a ſingle article of goods; and, as the bill in queſtion was granted for money borrowed, and applied by Weir for his own private behoof, the company could not be liable.

That every obligation or agreement entered into with Weir, in relation to purchaſes or ſales of the commodities in which the company dealt, will no doubt bind the company; but it will not from thence follow that every deed of Weir's, under the firm of the company, muſt rear up an obligation againſt them. If he had purchaſed an eſtate at an extravagant price, and granted bills to the ſeller, for the price, under the firm of the company, the company would not have been ſubjected in payment of theſe bills, as that would have been giving Weir the power of ſubjecting the company as cautioners to his own private tranſactions; a thing which he had neither title nor authority to do.

That the borrowing money is no act of ordinary adminiſtration in a company, ſuch as that now under conſideration. It may be true, that bankers, or merchants, properly ſo called, are accuſtomed to take money upon bills; but the preſent company act in a very different capacity, and cannot be conſidered as bankers, or properly merchants, but rather as ſhopkeepers, or ware-houſe men, for buying and ſelling of goods; and when the company had occaſion to borrow money, the whole partners ſigned the ſecurities granted for ſuch loans; and, although Weir had full power to manage ordinary occurrencies in the copartnery-trade, he could not bind the partners in matters out of the way of their common buſineſs; he could not diſſolve the company; he could not ſubmit the concerns of the company; he could not alter the nature of the trade; neither could he borrow money, unleſs particularly authoriſed.

The circumſtance of the contract of co-partnery not being regiſtered, cannot alter the argument one way or other. There is no particular regiſter eſtabliſhed in Scotland for copartnery-contracts; and regiſtration only takes place on account of diligence or preſervation.

It was further argued for the ſuſpenders, That Dewar ſeems to have lent his money entirely upon the faith of Weir. He does not alledge to have converſed with any of the other partners upon the ſubject, or ſo much as aſked them, if they were enga-

ged in a co-partnery with Weir. He could not diſcover from the form of Weir's acceptance who were his co-partners; nor did he ever ſee the contract of co-partnery; ſo that he muſt have had his information, as to all theſe particulars, from Weir alone, upon whoſe word, faith, and veracity, he has ſolely depended, and not upon any of the other partners, to whom he does not alledge he ever mentioned this matter.

That, in this country, tradeſmen and manufacturers have but ſmall ſtocks; and are, therefore, unable to carry on the different branches of their buſineſs, without the aſſiſtance of partners. Theſe partners are often merchants, and people of credit engaged in other branches of buſineſs; ſo that, from the nature of the thing, it muſt be the inferior people who are the acting partners in ſuch companies; and, conſequently, of neceſſity, they muſt be truſted with the firm of the company; but it cannot from thence, with any juſtice, be argued that the whole ſubſtance of ſuch merchants or others, as aſſiſt manufacturers in that way, is at the mercy of the tradeſmen with whom they are engaged; ſuch a doctrine would be ruinous and deſtructive to the trade and credit of the country.

The Lords altered the Lord Ordinary's interlocutor, 'Repelled the 'reaſons of ſuſpenſion, found the letters orderly proceeded; and de-'cerned.'

A reclaiming petition was preſented, upon adviſing of which with anſwers, memorials were ordered; and, upon the cauſe being again adviſed, the Lords adhered to their former interlocutor.

A. E.

For *Dewar, Lockhart.* For *Miller, &c. Henry Dundas, and Alex. Wight. Clerk.*

No. XXXIX. *June* 17. 1766.

Mr WILLIAM BAILLIE, *Advocate*;

Againſt

Mrs AGNES TENNANT.

Interpretation of the word Heirs *in a ſettlement.*

ALEXANDER WALKER of Stonypath left two children, viz. a ſon, William, afterwards miniſter at Mackerſton, who ſucceeded to the eſtate of Stonypath, and a daughter Iſobel.

The

The daughter married John Tennant of Hundaxwood, by whom ſhe had two children, Alexander, afterwards Colonel Tennant, and a daughter, Agnes Tennant.

After Mr Tennant's death, Iſobel Walker entered into a ſecond marriage with Thomas Baillie writer to the ſignet, by whom ſhe had three ſons and a daughter; and Mr William Baillie was the eldeſt of theſe ſons.

William Walker, the ſon and heir of Alexander Walker of Stonypath, in 1752, executed a deed of ſettlement, of the following tenor: 'I Mr 'William Walker of Stonnypath, miniſter of the goſpel at Mackerſton, 'for the love, favour, and affection I have and bear to my ſiſter, and her 'children afternamed, upon whom I am reſolved to ſettle my real eſtate, 'and to prefer them thereto next after the iſſue of my own body, in the 'order of ſucceſſion, and in the terms and under the conditions under-'written: Wit ye me to have given, granted, and diſponed, &c. to my-'ſelf in liferent, and to the heirs-male of my body; whom failing, to the 'heirs-female of my body, in fee; whom failing, to Iſobel Walker my ſi-'ſter, relict of John Tennant of Handaxwood, now ſpouſe to Thomas 'Baillie of Pollkemmet, writer to the ſignet, in liferent, for her liferent-'uſe allenarly, in caſe ſhe ſhall happen to ſurvive me, and, after her de-'ceaſe, to Alexander Tennant, now of Handaxwood, Lieutenant in Lord 'Burry's regiment of foot, my nephew, eldeſt lawful ſon to my ſaid ſiſter, 'and procreated between her and the ſaid deceaſed John Tennant, and 'his heirs and aſſignees, in fee; whom failing, to William Baillie, eldeſt 'lawful ſon to the ſaid Thomas Baillie, procreated between him and my 'ſaid ſiſter, his heirs or aſſignees, alſo in fee; whom failing, to my own 'neareſt and lawful heirs and aſſignees whatſomever.'

William Walker, the maker of the above deed of ſettlement, died without iſſue in 1759; and Lieutenant-Colonel Tennant, the fiar of the eſtate, died in 1769, without iſſue, or making any ſettlement.

Upon the death of Colonel Tennant, Mr William Baillie, the eldeſt ſon of Iſobel Walker by her ſecond marriage, and Agnes Tennant, ſpouſe to Mr Chatto, daughter to ſaid Iſobel Walker by her firſt marriage, ſeverally purchaſed brieves, for ſerving themſelves heirs of proviſion to Mr Walker, under the deed of ſettlement above mentioned; and, a debate enſuing upon this competition of brieves, it was taken by the Lords aſſeſſors to report of the court.

The *plea* maintained by Mr Baillie was, That he, being called *nominatim*, failing Lieutenant-Colonel Tennant and his heirs, the word *heirs*, in that deſtination, muſt be underſtood heirs of the body of Colonel Tennant; and, theſe having failed, he, as next ſubſtitute, was called to the ſucceſſion.

Mrs Agnes Tennant's *plea* reſolved into this, That ſhe, as ſiſter-german to Lieutenant-Colonel Tennant, was his heir; and, in that character, called to the ſucceſſion by Mr Walker's deed of ſettlement, in preference to Mr Baillie.

Pleaded for Mr Baillie: That the word *heir* is a flexible word, capable of more comprehenſive or limited conſtruction, according to circumſtances: That, in this caſe, the word *heir* muſt be taken in a limited ſenſe, as deſcriptive only of the heirs of Colonel Tennant's body: That the uſe of words is to convey the meaning and intendment of parties,

and

and the *voluntas* is the *ſuprema lex*: That the intention of Mr Walker, in the preſent caſe, appears to have meant no more than that the heirs of Colonel Tennant's body ſhould be preferred to Mr Baillie: That, in practice, the word *heirs*, in ſettlements, when applied to the different ſubſtitutes, is underſtood to mean no more than the heirs of their reſpective bodies, till the laſt branch of ſubſtitution, where the termination is generally in favours of heirs and aſſignees whatſoever.

That, to liſten to the plea maintained by Mrs Tennant, would not only defeat the intendment of Mr Walker's ſettlement, but would likewiſe be attended with the greateſt abſurdities; becauſe, according to it, every extraneous heir of Colonel Tennant, in whatever degree, rank, or condition, though not one drop of blood to Mr Walker, or his family, muſt be preferred to Mr Baillie and Mr Walker's other nephews and nieces by his ſiſter; and, by the ſame plan of argument, the ſubſtitution, in favour of Mr Baillie, was, from the beginning, altogether nugatory, and good for nothing, as it never could take effect, upon the ſuppoſition, that, on the death of Colonel Tennant, the eſtate muſt go to his collateral relations and heirs, to the remoteſt generation; and even, ſhould theſe fail, by the ſame rule, no good reaſon occurs why the ſovereign ſhould not take it as *ultimus heares*; as, in many caſes, it has been found, that the king, taking as laſt heir, has the ſame privileges with other heirs, particularly that he cannot be hurt by any death-bed deed. And it was farther argued, that, from the very words and meaning of the deed itſelf, Mr Walker's intention of calling Mr Baillie, in preference to Colonel Tennant's heir in general, was evident.

And, in ſupport of this plea, the following authorities were quoted; *L.* 102. *de condit. et demonſtrat.*; *l.* 30. *Cod. de fidecom.*; *l.* 57. § 1. *ff. ad S. C. Trebel.*; *l.* 25. § 1. *ff. de lib. et poſt.*; *l.* 17. 18. *and* 19. *ff. de leg.*; *l.* 24. *ff. de reb. dub.*; *l.* 67. *ff. de reg. jur. l.* 96. *eod.* Lord Stair, *b.* 3. *tit.* 5. § 12.; Dictionary of deciſions, *voce* Succeſſion; *l.* 17. § 8. *ff. ad ſcnat. conſult. Trebell.*; Bartolus commentary on ſaid law; *Paulus de Caſtro ad l.* 29. *de lib. et poſthum.*; Alexander Tartagno, *lib.* 5. *conciliorum concil.* 125.; *Mantica de conjecturis ultimarum voluntatum, lib.* 8. *tit.* 14.; *Weſſenbachius* commentary *ad tit. de verb. ſignif. l.* 65.; and *Gothfred, ad eandem legem.* Several authorities were likewiſe quoted from the law of England, particularly Peere Williams, vol. 1. fol. 23.; Trinity term 1700; Notinghame *verſus* Jenkins; Webb *contra* Herrin; Parker *verſus* Thacker; Tindal's tranſlation of Rapin's hiſtory, vol. 2. p. 68. and vol. 2. p. 74.; Bayle's Dictionary, art. Fran. I. King of France, remark c.

Anſwered for Mrs Tennant: That ſhe is called, by the clear words of the deed, under the deſcription of the heirs of Colonel Tennant: That there can be no doubt that ſhe is the heir of Colonel Tennant, being his ſiſter-german: That Mr Baillie is only called, failing Colonel Tennant, and his heirs, and aſſignees: That ſo plain and rational a ſettlement ought not to be overturned upon conjectures and preſumptions of a contrary will in the teſtator: That, in the preſent caſe, Mrs Tennant is as nearly relied to Mr Walker as Mr Baillie is: That, where there has been a former ſettlement, it has ſometimes been diſputed, whether the word *heir*, in an after ſettlement, meant the heir of the former inveſti-

tures,

tures or the *heir* at law; but, where there was no former ſetlement, as in this caſe, the meaning of the word *heir* never was diſputed.

That, from the words of the deed, it does not appear Mr Walker's intention was, that, failing Colonel Tenant, Mr Baillie ſhould ſucceed. That the authorities from the old Doctors of the civil law, ſuch as Bartolus, &c. ought to have little weight, conſidering the period at which they lived; and, at any rate, they applied only to *fidei commiſſarii* ſubſtitutions, in which a liberty of interpretation was taken by the Roman lawyers, which never was applied to direct ſubſtitutions.

'The Lords found, that the claimant Mr William Baillie is preferable, 'and entitled to be ſerved heir of proviſion to the deceaſed Mr 'William Walker, under the ſettlement above mentioned. Repel 'the objections to the ſervice of the ſaid Mr William Baillie,' &c.

A reclaiming petition for Mrs Tenant was refuſed without anſwers.

A. E.

For *Baillie, Lockhart.* For Mrs *Tenant, J. Burnet.* *Clerk.*

N. B. This deciſion was reverſed upon an appeal.

No. XL. *June* 19. 1766.

WILLIAM RORISON;

Againſt

JAMES SHAW.

Perſons carrying off a tenant's cattle while ſubject to the hypothec, not liable to the landlord who had done no diligence within three months.

WILLIAM RORISON, in Auguſt 1763, was appointed factor upon the ſequeſtrate eſtate of Barſcob; and, upon looking into the ſituation of ſaid eſtate, he found William M'Lurg, one of the tenants, in arrear of three years rent at Whitſunday 1763, and he diſcovered that James Shaw and others had, in May 1763, without any legal warrant, carried off M'Lurg's cattle; and, therefore, he brought a proceſs againſt him, before the Stewart-depute of Kirkcudbright, for payment of the rent 1763; in which the Stewart found Shaw and the others liable.

Shaw ſuſpended and *pleaded*, That, in the end of the year 1762, or beginning of the 1763, M'Lurg the tenant was indebted to Shaw and others in ſundry bills, of which payment being then demanded, M'Lurg not having caſh, ſold them a parcel of cattle, the price of which was to be imputed in extinction of the bills; and it was agreed, that the cattle

ſhould continue to paſture upon M'Lurg's grounds till the month of May 1763, as the purchaſers had not graſs for them ſooner; and that it was in conſequence of this tranſaction that Shaw carried off the cattle; in doing which, he was not interrupted by the landlord, and M'Lurg was credited with their value.

That, in this way, Shaw became proprietor of the cattle in a legal and proper manner, and for a juſt and onerous cauſe, that a right of hypothec and a right of property are totally different, the landlord's right of hypothec not conſtituting him proprietor of the ſubject over which it extends, but the property ſtill remaining in the tenant. That, in rural tenements, the hypothec over the fruits of the ground is held to be the principal ſecurity, that over the ſtocking being conſidered only as a ſecondary or ſubſidiary right. The hypothec on the crop is held to be perpetual, every crop being hypothecated for the rent of the year in which it is produced, till payment is actually recovered; whereas, the hypothec on cattle is limited to three months after the laſt conventional term of payment; and the landlord muſt loſe his right, if he does not uſe it within that time; Lord Bankton, vol. 1. p. 386. Erſkine, B. 2. tit. 6. § 28. Remarkable deciſions No. 76.

That, in the preſent caſe, the landlord's right was not exerciſed, or any challenge brought againſt the defenders within the three months; and, to continue this hypothec for a longer period, would be tying up the tenant's hands from ſelling or diſpoſing upon his ſtocking altogether; and altho' the landlord's claim might have been made effectual, had it been brought within the competent time, it cannot now be liſtened to; and as no reaſon occurs for extending the extraordinary privileges competent to a landlord by the hypothec, to the prejudice of onerous creditors, the landlord's claim ought to be ſtrictly interpreted.

Anſwered for Roriſon: It may be true, that, where the cattle are allowed to remain upon the farm for three months after the laſt term of payment, and the landlord takes no meaſures for ſecuring himſelf within that time, he loſes his right of hypothec. But that is not the caſe here; the cattle were in this caſe driven off the farm two days after Whitſunday, the term of payment, when they were unqueſtionably hypothecated for that year's rent; and, whoever, intromitted with them at that time, muſt of courſe be liable to the landlord; ſo that the queſtion comes to be, at what period does the landlord loſe his claim againſt the intromitters with the cattle?

The ſuſpenders argue, as if the landlord was obliged to bring his action againſt the intromitters within three months. The charger contends he is not.

Originally the whole crop and ſtocking on a farm was conſidered as the landlord's property, and might have been ſeized by his creditors. This was remedied by the act 1469; and afterwards, by the deciſions of the Court, the hypothec upon the ſtocking was limited to three months after the laſt term of payment: But, before ſuch limitation took place, whoever carried off the tenant's ſtocking at any time became liable for the rents; and, although the ſtocking may now ſafely be intromitted with after the lapſe of three months; yet, within that period, it cannot be ſeized by any perſon

perſon to the prejudice of the landlord's preferable right; and no perſon will venture to intromit with the ſtocking within that period, unleſs the value of the cattle exceed the year's rent, in which caſe the intromitter will no doubt have right to the ſurplus.

The charger can diſcover no authorities for obliging the landlord to bring his action againſt the intromitters within three months; and, as perſons intromitting within that time muſt lay their account with paying the year's rent, there appears no good reaſon for freeing them of the obligation they bring upon themſelves with their eyes open, by their intromitting within that period. The law has limited no particular time of the three months for the landlord's attaching the ſtocking: He may do it upon the laſt as well the firſt day, and, therefore, ought to have the ſtocking in his power during that whole period; and, if he is deprived of that ſecurity, the perſon who intromits muſt be himſelf liable for the rent.

'The Lords ſuſtained the defence, and aſſoilzied.'

A. E.

For *Roriſon*, *Pat. Murray*. For *Shaw*, *Geo. Wallace*. *Clerk*.

No. XLI. *June* 25. 1766.

ARCHIBALD ARBUTHNOT, Merchant in Edinburgh,

Againſt

ROBERT ARBUTHNOT, Eſq;

ALEXANDER ARBURTHNOT merchant in Edinburgh, in the year 1753, executed a general ſettlement of his whole effects, in favours of Robert his eldeſt ſon, at the ſame time, burdening him with the payment of his debts, and of the proviſions to his younger children, with an expreſs exception of ſuch particulars as he had conveyed to them.

Of equal date with the above mentioned ſettlement, he, by bond, obliged himſelf, his heirs, executors, and ſucceſſors, to pay to Archibald Arburthnot his ſecond ſon, L. 3000 Sterling at the firſt term after his death; after which the deed proceeds in the words which follow, and which gave riſe to the queſtion between the parties: 'And for the more ready and ſure 'payment to the ſaid Archibald Arburthnot, of the foreſaid ſum of 'L. 3000 Sterling, with intereſt thereof, as is before mentioned, Witt ye 'me to have aſſigned and diſponed, as I, by theſe preſents, aſſign, transfer, 'and diſpone to, and in favour of the ſaid Archibald Arburthnot, his 'heirs, executors, and aſſignees, the ſums of money principal contained, 'and to be contained in a liſt or inventory made, or hereafter to be made,

'and

'and ſubſcribed by me, relative hereto, with the penalties that ſhall be 'contained in the ſecurities for the ſaid principal ſums, and with what 'intereſt ſhall be due thereon, at the time of my death, and all time co- 'ming, ſo long as the ſame ſhall remain unpaid; and which liſt or inven- 'tory, with theſe preſents, ſhall have the full effect of a ſpecial diſpoſition 'and aſſignation, as much as if every article thereof were herein particu- 'larly inſerted, and expreſſed with full power to the ſaid Archibald Ar- 'burthnot and his foreſaids, to uplift and receive, and to do every thing 'neceſſary for making effectual the ſums of money ſo aſſigned, that I 'could have done in my life-time: And it is hereby provided and declared, 'that, in caſe I ſhould fail to make out any ſuch liſt or inventory, or if 'made out, in the event, that all or any part of the ſums of money there- 'in contained ſhall be uplifted and diſpoſed of by me during my life- 'time, and that I ſhould fail to replace the ſame in whole or in part, or 'if the principal ſums to be contained in ſuch liſt or inventory ſhall not 'extend to the ſum of L. 3000 Sterling, the obligation to pay before 'inſert ſhall ſubſiſt and remain binding on my heirs and executors, to 'the full extent thereof, or ſo far as there ſhall be a ſhortcoming of 'the ſaid ſum of L. 3000 Sterling, and for intereſt and penalty upon the 'whole, or in proportion to ſuch ſhortcoming as is before ſtipulated. 'Upon the other hand, if there ſhall be to the extent of the ſaid ſum of 'L. 3000 Sterling principal at the time of my death, aſſigned and made 'over to the ſaid Archbald Arburthnot, and the ſecurities for the ſame be 'herewith delivered to him, the foreſaid obligation for payment ſhall be- 'come void, and noways affect my heirs and executors, nor ſhall they be 'liable to make the ſame effectual to the ſaid Archibald Arburthnot or 'his foreſaids, though the debtors ſhall afterwards become inſolvent, or 'that the money, or any part thereof, ſhall be loſt by any other accident. 'But, in caſe the ſums particularly aſſigned to the ſaid Archibald Arburth- 'not, and his foreſaids, ſhall happen to exceed the ſaid ſum of L. 3000 'Sterling, neither he nor they ſhall be accountable to my heirs or execu- 'tors for any ſuch excreaſe or ſurplus.'

Of the ſame date alſo with the ſettlement abovementioned, Alexander Arburthnot ſigned an inventory relative to the bond of proviſion, where- in he conveys to his ſon Archibald, the ſum of L. 1000 Sterling, due to him by David Scott as treaſurer to the Bank of Scotland, and another ſum of L. 2000 Sterling, alſo due to him by the Marquis of Tweeddale, together with the penalties contained in the ſaid bonds, and all the an- nualrents that ſhould happen to be due on the foreſaid principal ſums.

Alexander Arburthnot died in October 1764; and, at his death, it ap- peared, that he had uplifted the L. 1000 Sterling due by Scott, and aſſign- ed as above mentioned; and alſo, that, at the term of Martinmas after his death, there was L. 175 Sterling of intereſt due on the Marquis of Tweed- dale's bond.

Robert Arburthnot the eldeſt ſon, in conſequence of the general diſ- poſition in his favours, uplifted the L. 175 Sterling of intereſt due as above mentioned, and inſiſted that all that his father intended by the ſet- tlement in favours of Archibald, was to leave him L. 3000 Sterling at his death; and that, therefore, the intereſt uplifted by him muſt be im-

puted

puted *pro tanto* of the L. 1000 Sterling which he acknowledged he was bound by his father's ſettlement to replace.

Archibald Arburthnot, in order to recover the diſputed L. 175 Sterling of intereſt, brought an action againſt his brother, in which it was *pleaded* for him, That their common father's intention in every clauſe of the bond of proviſion in his favour, was to give him the chance-benefit of whatever intereſt might be due at his death, upon all or any of the ſums aſſigned to him; and that the ſame was not to impute in payment of the ſpecial proviſion of L. 3000 Sterling principal made to him; for, as it appeared from the deed itſelf, that the purſuer was bound to take his chance of any ſhortcoming of the ſums provided to him by the debtors inſolvency, ſo their father was, on the other hand, equally deſirous that, in another event, the purſuer ſhould have the chance of any accidental benefit. In every clauſe of the deed he carefully diſtinguiſhes between the principal ſum and intereſt of the debts aſſigned; and although the proviſion of L. 3000 was only to become due at the firſt term after their father's death, yet he aſſigns to the purſuer not only the principal ſums contained in the inventory, but alſo what intereſt ſhould be due thereon at his death; beſides, in the event which happened, namely, that ſome of the debts aſſigned might be uplifted by him in his lifetime, and omitted to be replaced, he provides, that if the principal ſums to be contained in ſuch liſt or inventory, ſhall not extend to the ſum of L. 3000 Sterling, the obligation to pay ſhall ſubſiſt and remain binding on his heirs, executors, and ſucceſſors, ſo far as there would be a ſhortcoming of the L. 3000; which plainly indicates the meaning of the deed to be ſuch as the purſuer now contends for. But, further, ſuppoſing old Mr Arburthnot had not uplifted any of the ſums contained in the bonds aſſigned, and that at the time of his death many years intereſt had been due on theſe it could not be denied, that the purſuer would have had as good a title to the intereſt, as to the principal; and, if ſuch would have been the judgement of law, in caſe both bonds had been due at Mr Arburthnot's death, the purſuer could not ſee any reaſon for preſuming that he meant to deprive him of the intereſt of the one bond, becauſe the other happened to be uplifted during his life.

Anſwered for the defender, That the purſuer's obſervations on the different clauſes in the deed, although ingenious and plauſible, are far from being ſolid or concluſive; for, from the firſt part of the deed it was clear, that Mr Arburthnot intended that the proviſion to the purſuer ſhould not exceed the ſum of L. 3000 Sterling, with intereſt from the firſt term after his death. Neither was his having aſſigned the bonds abovementioned to the purſuer, to be conſtrued likewiſe into an aſſignation of the intereſt that ſhould be due upon theſe bonds, for that the only intention of their father, by executing the bond and inventory in favour of the purſuer, was to prevent family-diſputes amongſt his children, and not to confer an additional proviſion on the purſuer; and if the deed was viewed in that light, the obſervations made on it by the purſuer, would appear to be very ill founded. The reaſon which Mr Arburthnot gives for granting the aſſignation in favour of the purſuer, namely, to prevent family-interferences, plainly ſhows, that his only intention was to avoid diſputes betwixt his children; and if the different clauſes of the deed are

viewed in that light, the conſtruction which the defender now puts upon them, will appear clear and evident.

'The Lords found the purſuer entitled to the intereſt that was due on 'the Marquis of Tweeddale's bond at his father's death, extend-'ing to L. 175 : 11 : 0 Sterling, and likewiſe to the further ſum 'of L. 1000, and intereſt thereof from the firſt term after his fa-'ther's death, and to expences; and, on a reclaiming bill, they ad-'hered without anſwers.'

J. S. *tertius*.

Act. *Lockhart*. Alt. *M'Kenzie*. *M'Queen*. *Clerk*.

No. XLII. *July* 4. 1766.

JOHN GOODFELLOW, Watchmaker in Stirling;

Againſt

The CORPORATION of HAMMERMEN there.

The privileges of the Corporation of Hammermen in Stirling, found not to extend to the excluſion of a watchmaker's working there, although he refuſed to enter a member of the Corporation.

JOHN GOODFELLOW, by profeſſion a watchmaker, having come to Stirling to exerciſe that employment, and having, in conſequence thereof, taken a houſe and ſhop, was ſoon thereafter informed by the deacon of the hammermen, and other members of that incorporation, that the trade of watchmaking within the royalty was confined to their corporation; and that, therefore, he could not exerciſe that employment there without permiſſion from them.

It appeared that John Goodfellow had a communing with the deacon and incorporation, and afterwards was admitted burgeſs *qua* hammerman, by which he paid but the half of what he would otherwiſe have paid, had he been admitted as a common burgeſs. But having refuſed to make an eſſay-piece in order to his being entered with the trade, although repeatedly ordered ſo do, a complaint was exhibited againſt him before the magiſtrates of Stirling, at the inſtance of the corporation, and his defences having been over-ruled, the following interlocutor was pronounced by them: 'Having conſidered the petition and repreſentation, with the 'extracts of the hammermen trade produced, with the defences and an-'ſwers, and having alſo ſeen the council-book of the borough, wherein 'the defender was admitted and ſworn as a burgeſs *qua* hammerman 'of the ſaid borough, and, on that account, only paid L. 12 Scots of

'entry-

'entry-money as a tradeſman, which, had he entered an ordinary bur-
'geſs, it would have coſt him L. 24; therefore repels the defences in re-
'ſpect of the anſwers, and the other reaſons before mentioned; and finds
'the defender cannot follow his buſineſs as a watch or clockmaker with-
'in the borough, without entering with the trade, and appoints him
'within a few days thereafter to go on and finiſh his eſſay. And he
'having ſtill delayed to make an eſſay-piece, they prohibited and diſ-
'charged him from exerciſing any branch or part of the buſineſs pecu-
'liar to the hammermen-craft within the borough, while he continued
'unentered with them, under the penalty of five ſhillings Sterling, to be
'forfeited by him to the ſaid craft, for each treſpaſs he ſhall be convic-
'ted of; and granted warrant to the officers of the borough, jointly or
'ſeverally, to ſecure and ſeize his tools and work, if he ſhall be found
'working, or ſervants under him, within the liberties of the ſaid borough,
'at clock or watchmaking, or other parts of the hammerman-buſineſs,
'after he is charged to the above effect, ſo long as he continues un-
'entered with the ſaid incorporation, and to carry the defender himſelf
'before any of the magiſtrates to be examined thereanent, and be proceed-
'ed againſt and convict of ſuch treſpaſſes; finds the defender has been
'litigious in this proceſs; and that he is liable in the purſuer's charges
'and expences, which modifies to the ſum of L. 1 : 10 : 0 Sterling mo-
'ney, for which decerned againſt the defender, and for the expence of
'extracting the decreet.'

Of this interlocutor John Goodfellow obtained a ſuſpenſion, and *pleaded*, 1*mo*, That the incorporation of hammermen in Stirling had uſurped the privilege of an incorporation without any title; for neither had they been erected into a corporation by the town's charter, nor had they produced any ſeal of cauſe; and, therefore, the magiſtrates had done wrong in ſuſtaining action at their inſtance. Every purſuer, before he can be heard even in a common cauſe, is obliged to produce his titles, to inſtruct that he has a right to what he claims, and, if ſuch obtains in ordinary matters, *a fortiori* ought it to take place in the preſent queſtion, where an excluſive privilege was attempted to be obtained, detrimental to the freedom of trade, and which privileges, even when legally founded, have for that reaſon been always moſt ſtrictly interpreted. 2*do*, Supposing the ſmiths of Stirling were allowed to aſſume the title of the incorporation of hammermen, yet it did not from thence follow, that the clock and watchmakers were part of their ſociety. The only method by which an incorporation can be legally erected, and obtain excluſive privileges, is by the charter of erection of the borough, containing a power to the magiſtrates to create and erect certain trades into incorporations, by a ſeal of cauſe. But, certain it is, that, at the time that the charter of erection was granted to the borough of Stirling, no ſuch privilege could be conferred upon any incorporation erected in that town, becauſe it would not be diſputed, that at that time the art of clock and watchmaking was not known in this part of the world.

Anſwered for the chargers, That, if the firſt reaſon of ſuſpenſion was ſuſtained, moſt of the incorporations of Scotland would be cut down, becauſe many are the creatures of immemorial cuſtom, and very many who once had ſeals of cauſe have loſt them by length of time; and, as privi-

leges

leges may be acquired by uſage or preſcription; ſo, as they could ſhow that the watchmakers had always been part of their incorporation, the not production of their ſeal of cauſe was no good reaſon of ſuſpenſion, becauſe, as far back as the 1616, it appeared, by an agreement between the merchants and trades of Stirling, ſigned by their then deacon, and ſeveral other members, that the deacon of the incorporation of the ſmiths ſigned, amongſt the reſt, which is a plain proof, that they were then an incorporation. 2*do*, A condeſcendence was produced, from which it appeared, that every watchmaker that has been in Stirling, from the 1698, down to the preſent time, had underſtood himſelf to be comprehended under this incorporation, and entered with it accordingly; and even the ſuſpender himſelf applied for leave to enter with this incorporation, obtained it, and, in order to compleat his entry with the trade, got himſelf admitted to the liberty and freedom of a burgeſs, *qua* hammerman, took the burgeſs-oath, and paid the dues of his entry, and thereby homologated the right which the chargers contended for; but which, even without that, by the inſtances before mentioned, was ſufficiently aſcertained.

Replied, That in this caſe there could be no preſcriptive right pleaded, becauſe, from what was above ſet forth, the magiſtrates had no power to create and erect ſuch an incorporation; neither could the condeſcendence given in by the incorporation of hammermen have any weight; becauſe, although particular perſons exerciſing the art of watchmaking may, for private reaſons, have choſe to have got themſelves inrolled as members of the hammerman-craft; yet this could be extended no further than to the perſon entered.

'The Lords ſuſpended the letters *ſimpliciter*, and decerned.'

J. S. *tertius.*

Act. *D. Armſtrong.* Alt. *Lockhart and MacLaurin.* *Clerk.*

XLIII. *July* 23. 1766.

ANDREW TAIT Organiſt in Aberdeen;

Againſt

JOHN SLIGOW, Merchant in Aberdeen.

Not neceſſary to raiſe an action of removing or uſe formal warning 40 days before term of removing, from tenements within borough.

SLIGO poſſeſſed a ſhop in the town of Aberdeen, the property of Tait, who on the 13th May 1766, preſented a petition to the magiſtrates, ſetting forth, that, in December preceeding, he had informed Sligo, that the ſhop was ſet to another, and praying that Sligo might be decerned to remove from ſaid ſhop.

To

To this petition Sligo give in anſwers, and *objected* to the competency, as not being brought 40 days before the term, nor any formal warning executed, which he contended was neceſſary, in order to remove him.

Tait in reply *inſiſted*, That having told Sligo, in December preceeding, that he muſt remove, that was ſufficient warning, as no regular action of removing or formal warning was neceſſary in removings from urban tenements, and craved Sligo might be examined as to the fact of his being told, in December, that he muſt remove from his ſhop, and his agreeing to do ſo.

The Magiſtrates examined Sligo, who acknowledged, that Tait had told him, in December, that the ſhop was let to another; but denied that ever he agreed to remove, or promiſed to remove. Tait inſiſted for a proof, to ſhow that Sligo had taken another ſhop, and given reaſon to believe that he would remove. Which proof the magiſtrates allowed before anſwer. Sligo objected to the proof as incompetent and irrelevant, as no regular action of removing had been brought, or warning executed, 40 days before term; and applied to this court by advocation.

In the mean time, the proof was taken, and adviſed by the magiſtrates, who ordained Sligo to remove; but a ſiſt on the advocation being obtained, prevented the interlocutor of the magiſtrates from being carried into execution; and afterwards, on adviſing the advocation with anſwers, &c. June 24. 1766, the Lord Gardenſton Ordinary refuſed the bill.

Pleaded, in a reclaiming petition, Though in removing from tenements within borough, warnings, with all the ſolemnities required by act 1555, are not neceſſary; yet, to prevent every removing from becoming an arbitrary queſtion, there are certain eſtabliſhed forms neceſſary in removings from urban tenements; ſuch as having the door chalked by a borough-officer, or an action brought againſt the tenant 40 days before the term. And, in ſupport of this plea, the following authorities were referred to; Sir Thomas Craig, *lib.* 2. *dieg.* 9. § 9.; Lord Stair, *B.* 2. *tit.* 9. § 40.; Lord Bankton, *B.* 2. *tit.* 9. § 52.; Mr Erſkine, *B.* 2. *tit.* § 20. Waugh *contra* Abercromby, March 1680; Harcarſe, *voce* Removing, and act of parliament of 1690. cap. 39.

Anſwered for Tait, The formalities neceſſary to be obſerved in removings from rural tenements, are not requiſite in urban ones. It is ſufficient in the latter, that the material purpoſe is anſwered, namely, the giving timeous notice to the tenant to provide himſelf in another houſe, which was done in the preſent caſe, by the notice given the petitioner by the reſpondent in December, ſeveral months before the term of removing. The formalities requiſite in warnings from urban tenements, depend on cuſtom, not being regulated by any ſtatute. In ſome boroughs, particularly Edinburgh, the formality of a town's-officer chalking the tenant's door has been commonly uſed in warning, which probably has led Sir Thomas Craig, Lord Stair, and Lord Bankton, to mention the interpoſition of a town-officer, as a ſolemnity requiſite to warnings within boroughs. It has been found, that the order of a magiſtrate is not neceſſary to authorize the officer to warn; and that the verbal order of the proprietor is ſufficient; 24th June 1709, Barton *contra* Forbes, which proves that the eſſential point is the tenant's getting no-

tice 40 days before the term: And whether ſuch notice is given by a town-officer, or the proprietor, appears to be altogether immaterial.

'The Lords adhered.'

For *Tait*. *David Rae*. For *Sligo*, *Alex. Elphingſton*. *Tait Clerk*.

No. XLIV. *July* 25. 1766.

JANET GIBB,

Againſt

ALEXANDER LIVINGSTON.

In a reduction of a bond upon the firſt branch of the act 1621, *competent to redargue by parole-evidence the narrative of the bond, bearing to be for borrowed money.*

LAURENCE GIBB, upon the narrative, that he had borrowed and received from Andrew Williamſon, his ſon-in-law, the ſum of L. 50 ſterling, granted an heritable bond for that ſum, over a tenement in the town of St Andrew's. This bond was adjudged by Livingſton, a creditor of Williamſon.

Janet Gibb, a creditor of Laurence Gibb, having brought a reduction of this bond, upon the firſt branch of the act 1621, the firſt queſtion was, whether a reduction was competent againſt the defender, a creditor-adjudger of the bond. The court 'Repelled the defence, that adjudgers from a conjunct and confident perſon, are not liable to the challenge ariſing from the act 1621; but, in reſpect of the particular circumſtances of this caſe, found that the defender is not obliged to aſtruct the heritable bond in queſtion.'

The purſuer having offered to prove by witneſſes, that the bond was gratuitous, the defender *contended*, That parole-evidence was not competent to redargue the narrative of the bond; founding both upon the general principle, that writing cannot be defeated by witneſſes, and alſo on the tenor of the act, which mentions only a proof by writing, or the oath of party.

Anſwered for the purſuer, A proof by witneſſes is admitted in all caſes of fraud, though the effect of that proof may be to cut down a writing. Had it been alledged that Laurence Gibb was impoſed on in granting the bond, parole-evidence would have been unqueſtionably competent. It ought to make no difference, that Gibb himſelf was a partaker of the fraud.

The act only ſays, That a proof by oath or writ of party ſhall *be ſufficient*. But this is not abſolutely excluſive of a proof by witneſſes.

When the court requires a proof, that a deed challenged upon this act was onerous, as is always done when the conjunct or confident perſon

is

is himſelf the defender, parole-evidence is admitted; 5th July 1673, Home *contra* Smith; 15th December 1671, Duff *contra* Culloden. It ſeems reaſonable, that the ſame ſpecies of proof ought to be received, when, from the circumſtances of the caſe, as here, the court ſees fit to lay the *onus probandi* upon the purſuer.

'The Lords found, That it was competent to the purſuer Janet Gibb 'to aſtruct, by facts and circumſtances, the grounds of her reduc- 'tion, and allowed her to prove, both by witneſſes and writing, the 'ſeveral facts mentioned in her condeſcendence.'

'Upon adviſing a reclaiming bill and anſwers, the Lords adhered.'

A. R.

Act. *Burnet.* Alt. *Rae.* *Pringle, Clerk.*

No. XLV. *November* 18. 1766.

WILLIAM-GEORGE, &c. ROSS,

Againſt

WILLIAM MONRO of Newmore.

An Heir of entail allowed to purge an irritancy, after an action was brought by the next ſubſtitute in the entail for declaring the ſame.

BY the two entails of the lands of Aldie, and of Newmore, it appeared to be the intention of the proprietors, the makers of the entails, that the two eſtates ſhould not centre in one perſon; for, by a clauſe in the entail of the eſtate of Aldie, it is provided, 'that the heirs there- 'in mentioned ſhall be obliged to aſſume, and conſtantly uſe and bear, 'the ſurname of Roſs of Aldie, and arms of the family of Balnagown, 'without any alteration or diminution whatever, as their ſurname, de- 'ſignation, and arms in all time after their ſucceſſion to the proper eſtate 'of Aldie, under the pain of incurring the irritancy of tinſel of the e- 'ſtate.' And by a clauſe in the entail of Newmore, it is provided, 'That the heir, whether male or female, and their heirs, who ſhall ſuc- 'ceed to the eſtate of Newmore, ſhall be obliged to aſſume, and take, 'and ever thereafter uſe the name and arms of Monro; and the title 'and deſignation of Newmore, without joining or bearing any arms, 'names, or title therewith.'

In virtue of the tailzie of the eſtate of Aldie, William Roſs ſucceeded, and enjoyed the poſſeſſion of that eſtate, without making up titles thereto; but bore the arms of the family of Balnagown, and uſed the name of Roſs of Aldie, as appointed by the tailzie.

William

William Roſs, by the death of the former heir of tailzie of Newmore, came to have a title by the entail to that eſtate; alſo in virtue whereof, he aſſumed poſſeſſion of the eſtate of Newmore, keeping alſo poſſeſſion of the eſtate of Aldie; but allowing himſelf to be deſigned Monro of Newmore, and deſigning himſelf alſo that way by his ſubſcription.

William-George-Simon-David Roſs, the next ſubſtitute in the entail of Aldie, thinking that the defender had thereby incurred an irritancy ſufficient to forfeit him of his title to that eſtate, brought a proceſs for declaring the ſame, in which he pleaded, That, from the anxious clauſes in the entails of the eſtates of Aldie and Newmore, it was plainly the intention of the makers of theſe entails, that the eſtates ſhould be poſſeſſed by different proprietors, and their families differently repreſented; and, therefore, that the will of the different proprietors of theſe eſtates, which was clear, ought to be followed as the rule in judging of the cauſe; and, if it was ſo, there could be no doubt, from the *ſpecies facti* above ſet forth, that the irritancy was incurred, and would be declared, according to the rule laid down by Sir George M'Kenzie in his Inſtitutes, *B.* 2. *T.* 5. p. 13. and *Dic. Deciſ. tit.* Irritancies, where a diſtinction is made betwixt ſtatutory and conventional irritancies, the one being purgeable at the bar, the other not; and it was ſaid, that there was no doubt, that the irritancy ſought to be declared was a conventional one, and, therefore, not purgeable; and the caſe of Denholm of Weſt-ſhiels, February 1. 1726, was appealed to, where it was found, that an irritancy in an entail could not be purged.

Anſwered for the defender, That, whatever rigour prevailed in the ancient law, with regard to the not-allowing irritancies of this kind to be purged; yet that, at preſent, that rigour was ſoftened, and wherever no damage could be alledged to have accrued to the eſtate, the law now allowed an omiſſion, ſuch as the preſent, to be purged by a compliance with the terms of the entail, which the defender has now done, by reaſſuming the name of Roſs of Aldie, and the arms of the family of Balnagown, in ſo far as he is allowed. 2*do*, It was pleaded, That the obligation impoſed by the tailzie of the eſtate of Aldie, of aſſuming the name and title of Roſs of Aldie, &c. without any alteration or diminution whatever, was not inconſiſtent with aſſuming the name, &c. of any other family, as an addition to thoſe of Aldie, *eſto* that, from the words in the entail of the eſtate of Newmore, the doing ſo would incur a forfeiture of the defender's right to that eſtate; yet, that being *jus tertii* to the purſuer, it was not competent for him to found an argument upon it. 3*tio*, It was pleaded, That as the obligation impoſed by the tailzie of Aldie, of aſſuming the ſurname of Roſs of Aldie, and bearing the arms of Balnagown, made but one condition in part impreſtable, the not complying with that part of the condition that was preſtable could not forfeit the defender of his title to the eſtate. And, *laſtly*, It was ſaid, That the deciſion in the caſe of Weſt-ſhiels was altered in the laſt reſort; and, therefore, could have no weight; and the caſe of Sir John Gordon againſt Mr Charles Hamilton-Gordon, and that of Cromwell Price, were appealed to, to ſhew that irritancies, ſuch as the preſent, were purgeable at the bar.

'The Lords ſuſtained the defence, aſſoilzied the defender; and decerned.'

Act. *Burnet.* Alt. *Lockhart.* *Clerk.*

No.

No. XLVI. *November* 18. 1766.

Poor AGNES JOHNSTON,

Againſt

JAMES *and* WILLIAM SMITHS.

What Proof neceſſary to eſtabliſh Marriage.

AGNES JOHNSTON was ſervant to William Smith of Forthingruſh, at the time of his death, ſoon after which, having bore a child, which ſhe ſaid was begot by Forthingruſh in lawful marriage, in order to eſtabliſh the ſame, ſhe brought a proceſs of declarator of marriage before the Commiſſaries of Edinburgh. The proof from which ſhe endeavoured to eſtabliſh her marriage, was, *firſt*, The teſtimony of a ſingle witneſs who ſwore to his having ſome times called her his wife. And, 2*dly*, The two pieces of written evidence which follow. 'Forthingruſh, 5th February 1753, I do acknowledge, that I was lawfully 'married to Agnes Johnſton, in the year 1752, by a miniſter, that I 'brought from Edinburgh for that purpoſe; our marriage-lines being 'miſlaid, I grant her, the ſaid Agnes Johnſton, this acknowledgement 'under my hand, teſtifying, that ſhe is my true and lawful married wife; 'as witneſs my hand, day, date, and year of God above mentioned.' The next piece of written evidence is of the following tenor. 'Forthingruſh, 2d June 1756, as I am taken badly, and know not but it may 'be death, and that it has not been made public to the world, that I 'am married to Agnes Johnſton my wife, who has lived with me ſeveral years; to take away all theſe alledgeances and miſreports that may 'be ſpread to the contrair, I now, a dying man, cannot but acknowledge, 'that ſhe is my lawful wife; and that, if ſhe be with child, as ſhe tells 'me ſhe is, I am the father of it, and ought to be my heir, whether lad 'or laſs; and it is my will and inclination, that my wife be provided for, 'in caſe of death; and that ſhe have and enjoy 100 merks Scots yearly 'of my rents, for her ſubſiſtence, in caſe ſhe be not with child; and, in 'caſe ſhe be with child, that ſhe enjoy all my moveables, crop and ſtock, 'and poſſeſs what ground I preſently poſſeſs during her lifetime, for 'the ſupport of herſelf, and upbringing the child, and whatever more 'Glenriddle, Craigen-puttoch, Mr William Sloan miniſter, and Mr William Clerk writer in Dumfries jointly, ſhall determine ſhe ſhould have, 'in caſe ſhe have a child, in the event of my death, I ordain her to have 'it. As to my bodily cloaths, I leave it to my wife to give them as ſhe 'pleaſes to my brother, and I deſire and ordain her to keep my nephew 'John Smith as long as ſhe lives, and to do for him as far as ſhe can. 'And this I declare to all concerned to be truth, and to be my will. 'And in token, whereof, I ſign this paper, with my hand this day, and 'for the more ſecurity, I have put this paper among my papers, to teſtify the truth to every body. (S. S.) William Smith.'

The Commiſſaries found no ſufficient proof of a marriage betwixt the purſuer and the deceaſed William Smith; and, therefore, aſſoilzied the defender.

In a bill of advocation for the purſuer, it was *contended*, That the Commiſſaries had committed iniquity in not finding the marriage proven, in ſo far as, by the law of Scotland, conſent alone is all that is requiſite to conſtitute marriage; and, in all queſtions concerning marriage, the only thing inquired into is, whether there is ſufficient evidence of ſuch conſent: That, by the depoſitions of all the witneſſes adduced for the purſuer, it is evident, that he acknowledged her frequently as his wife, and that they did cohabit together as ſuch, upon repeated occaſions; and, when the writings granted by Forthingruſh were joined to the parole-evidence, it was ſaid that there could not remain the leaſt doubt that the purſuer was lawfully married to Forthingruſh.

Anſwered, That although, by the law of Scotland, cohabitation as man and wife does eſtabliſh a marriage; yet ſuch cohabitation requires the open and repeated acknowledgement of the parties, and muſt appear to be the reſult of a deliberate intention, to avow each other as man and wife, and not the tranſient acknowledgement of marriage by one of the parties, without the other's preſence before ſingle witneſſes, which is all that the witneſſes for the purſuer have depoſed to: More eſpecially, when to this is joined the depoſitions of ſundry witneſſes adduced by the defender, who have ſwore, that Forthingruſh, leſs than a year before his death, declared he would never marry. And with regard to the written evidence founded on, it was contended, that it could have no weight, as it was not holograph of Forthingruſh, nor ſubſcribed by him, before witneſſes. 2*dly*, That there was the greateſt reaſon to believe, from the evidence of two unſuſpected witneſſes, and *ex comparatione literarum*, that Forthingruſh had never ſubſcribed theſe papers; and that the whole was a forgery, calculated to ſupport what the purſuer's witneſſes had ſwore to. The authorities cited for the defenders, were *Maſcardus de probationibus* vol. 3. *conc.* 1035. No. 20. Corvinus Inſtitutions of the Canon law, *lib.* 3. *tit.* 26. *de probationibus*; act 77, parliment 1503; Dirleton, *voce* Marriage; Lord Bankton; *Matthaeus de probationibus*, *cap.* 1. Numb. 41.; Gail. *lib.* 2. *obſerv.* 66. *par.* 12.

'The Lords Refuſed the bill, and remitted the cauſe to the Commiſſaries *ſimpliciter*.'

Actor. Alter *Alexr. Murray*. *Clerk.*

Reporter, Kames.

No. XLVII. *November* 21. 1766.

WILLIAM BUCHANNAN,

Againſt

JOHN CLARK.

The Act 1695 *found not to apply where the fields required to be divided amounted to* 13 *acres—Act* 1661.

WILLIAM BUCHANNAN and John Clark were proprietors of the lands of Little Udſton, which conſiſted of 112 acres, partly infield, partly outfield.

The infield land conſiſted of three fields of 13, 29, and 41 acres, two of which, being the fields of 13 and 29 acres, belonged to Clark, the other of 41 belonged to Buchannan.

John Clark being deſireous to have his two fields incloſed, and that Buchannan ſhould be ſubjected in half the expence, brought a proceſs before the Judge Ordinary, founded on the 41ſt act 1ſt, ſeſſion 1ſt, parliament of Charles the II. ſubſuming, that he was about to incloſe ſeveral parts of the lands of Little Udſton, and particularly two fields, one of 13, and the other of 29 acres, which lay conterminous to William Buchannan's lands, and concluding, that Buchanan ſhould be decerned, in terms of the act, to bear an equal expence in raiſing a fence to divide their inheritances.

It was *pleaded* in defence, That as the lands required to be incloſed lay run-rig, the act of parliament above founded on could not apply until the lands were divided; and, in order to obtain a diviſion, Buchannan brought a proceſs againſt Clark, founded on the act of parliament 1695.

Pleaded for Clark, That the intention of the legiſlature, by the act 1695, was to prevent the inconveniencies which aroſe from people being obliged to poſſeſs acres that are interſperſed, and which, therefore, could not be properly cultivated; but did not apply to the preſent caſe, as the ſmalleſt of the fields belonging to him conſiſted of 13 acres.

The Judge-ordinary pronounced an interlocutor, finding the ground craved to be incloſed by John Clark did not fall within the act made anent run-rig, and William Buchannan liable in the one half of the expence of incloſing; and that he ought to concur with John Clark in making a proper fence upon the march which divides their reſpective properties, &c.

Of this interlocutor Buchannan complained by an advocation, and *pleaded*, *primo*, That the act 1695, being introduced for the improvement of the country, by planting and incloſing, and having no where particularly defined what is meant by run-ridge, ought to receive a moſt liberal interpretation, as in practice it generally has done in caſes that came

came to be determined by the court, ſimilar to the preſent, particularly in the caſe of the heritors of Invereſk againſt Mill, 13th November 1755; and in the caſe of George Chalmers againſt Mary Pew, in which the act was found to extend, not to lands belonging to different proprietors only, but to all fields lying run-dale, without regard to their ſhape or extent; for, in the one caſe, a field of ſix acres was found to fall within the act, and, in the other, fields of two or three acres were found to fall within it; and as fields of ſix acres cannot, ſtrictly ſpeaking, be denominated run-rig lands, more than fields of 12 acres, ſo, where the convenience is the ſame, the ſame remedy ought to be applied; that, in this caſe, the inconveniency could not be diſputed, ſeeing it would not be denied, that Clark had no road from one of his fields to the other, but through Buchannan's grounds.

Secundo, It was *contended*, That the act 1661 did not apply to the preſent caſe, in reſpect that the whole rent of the half of the lands belonging to Buchannan, both outfield and infield, amounted only to L. 4: 6: 10½; and it was ſaid that it was the rent, and not the extent, of the ground, which ought to be conſidered in the preſent queſtion; and, and if ſo, the caſe of Dr Penman *contra* Douglas and Cochrane, 3d July 1739, might be appealed to, where it was found, that the act 41ſt parliament 1661, burdening the heritor of the adjacent ground with the half of the expence of the march-dyke, did not reach ſmall feuers, who had not above five or ſix acres of ground.

Anſwered, That, if a diviſion of the fields in queſtion was to take place on the act 1695, there would be no knowing where to ſtop, as, with equal reaſon, might two proprietors, who have their eſtates interſperſed, apply for a diviſion of ſuch, however large the ſame might be; a caſe which was never ſuppoſed to fall within the act, although, no doubt, it would be more convenient: That the act 1695, which, in the caſes to which it applies, obliges a man to part with his property without his conſent, being in ſome meaſure an incroachment upon it, ought not to be extended: That the diviſion demanded by Buchannan was highly unreaſonable, as the extent of the ſmalleſt of the incloſures ſurpaſſed what any ordinary incloſure generally conſiſts of. Neither could he be in the leaſt degree aided by the two deciſions to which he appealed; becauſe, in both caſes, the lands thereby found to fall within the act 1695 were a long ſmall ſtrip, which could not be incloſed ſeparately, as they lay, without an expence ſuperior to their worth; whereas the ground required to be divided by the preſent action conſiſted of three fields, the ſmalleſt of which extended to 13 acres.

To the *ſecond* reaſon of advocation, it was *anſwered*, That Buchannan undervalued his ground much; but, even allowing that he had not done ſo, yet there was no doubt, that the action founded on the act 1661 is properly brought. The great object of that act is the improvement of uncultivated grounds; and wherever ſuch are of ſo great an extent, as to be fit to be incloſed with advantage to the heritor, they certainly fall within the ſpirit and words of it; and the deciſion in Dr Penman's caſe did not weaken the doctrine pleaded; becauſe it was only thereby found, that the act did not reach ſmall feuers, who had not above five or ſix acres of ground; whereas, as in this caſe, Buchannan is proprietor of 55

acres

acres of the lands of Little Udſton; and alſo of a part of the lands of Blantyre, which lie contiguous to, and march with his lands of Little Udſton.

'The Lord Ordinary found, That the three fields required to be divided by the act 1695, did not fall under that act; and, therefore, repelled the reaſons of advocation, and remitted the cauſe *ſimpliciter*; to which interlocutor the Lords adhered; and refuſed a reclaiming bill, without an anſwer.'

J. S. *Tertius.*

Actor *MacLaurin.* Alter *MacQueen.*

No. XLVIII. *November* 26. 1766.

GEORGE BAILLIE of Leys,

Againſt

Mrs JEAN ROSS of Hawkhead and ELIZABETH COUNTESS of GLASGOW, and their reſpective Huſbands.

Reduction of a Decreet of Forthcoming.

JOHN BAILLIE writer to the ſignet, became jointly bound with John Shaw, in payment of ſundry ſums to ſeveral different perſons; but, as all the ſums borrowed were for the behoof of Shaw alone, he, of the date of granting the bonds, alſo granted a bond to Mr Baillie, for relieving him from payment of any part of the money borrowed.

John Baillie raiſed letters of inhibition, containing arreſtments on the bond of relief, and, in virtue thereof, arreſted ſums far exceeding what he was bound for alongſt with Shaw, in the hands of many different perſons; particularly, he arreſted in the hands of George Lord Roſs, the defender's father, the ſum of L. 500 Sterling, as due by him to Shaw the common debtor.

Some time after uſing the above arreſtments, John Baillie brought an action of forthcoming thereupon, againſt the ſeveral arreſtees, and John Shaw the common debtor, in which a day having been aſſigned to the arreſtees to depone, and they having failed ſo to do, the term was circumduced, and decreet pronounced againſt them in terms of the libel; of which, however, ſundry of the arreſtees having obtained ſuſpenſion, they were reponed to their oaths, and having deponed *negative*, were aſſoilzied; but as to Lord Roſs, no ſuſpenſion of the decreet againſt him was applied for, or obtained; and, during all his life, and that of Mr Baillie, it did not appear that any demand had ever been made on him for the ſum, for which the decreet went out againſt him; but, after both their deaths, an action was brought by the purſuer, eldeſt ſon and heir of John Baillie, againſt the defenders, as repreſenting their father, Lord Roſs, for pay-

ment of the L. 500 Sterling contained in the decreet of forthcoming above mentioned, and the defenders having been allowed to repeat a reduction of it, it was *pleaded for them*, That that decree could not operate againſt them, for the following reaſons: 1*mo*, Becauſe it was in abſence, no regular compearance having been made in the proceſs for Lord Roſs their father. It was true indeed, that a lawyer compeared and took a day for the whole defenders to depone, and craved a commiſſion for taking all their oaths; but this of itſelf ſhowed, that that lawyer's compearance was the work of Mr Baillie himſelf, eſpecially *quoad* Lord Roſs, who lived always in town; and, therefore, no lawyer compearing for him by his authority, would have craved a commiſſion for his deponing. 2*do*, Although the decreet ſhould be held as a decreet in *foro*; yet there were many nullities in it, all, or any of which, were ſufficient to reduce the ſame. For, in the *firſt* place, no leſs than thirteen defenders were purſued in one ſummons, as debtors to John Shaw; yet no roll of the defenders names appeared to have been put upon the wall, and the whole were inſiſted againſt at one and the ſame time, although the forms of court require, that they ſhould have been inſiſted againſt ſix by ſix, in ſo many ſucceſſive weeks rolls. 2*do*, The extracted act for circumducing the term againſt the defenders, and on which the circumduction went, was no better than a ſheet of blank paper, in ſo far as it was, when extracted, blank both as to the commiſſioner who was to take the defenders oath, and blank as to the time when and place where their oaths were to be taken. 3*tio*, The proceſs was aſleep when the circumduction was obtained, in regard that no ſtep had been taken in it for the ſpace of ſeventeen months prior thereto, *viz.* from the 6th of February 1745, the date of the interlocutor granting the act and commiſſion, till the 25th July 1746, when the circumduction was obtained.

Anſwered for the purſuer, to the firſt defence, That there cannot be the leaſt doubt, that the decreet on which the action is brought muſt be underſtood to be a decreet *in foro*; becauſe, if conjectures ſuch as thoſe founded on by the defenders, were to be liſtened to, the faith of all judicial proceedings would be ſhaken. When a lawyer appears for a party, it is preſumed that he has authority ſo to do; and any ſtep taken by him muſt be binding upon his clients. Neither was there any impropriety in craving a commiſſion; becauſe, when there are a number of defenders, ſome in town, and others in the country, it is extremely common ſo to do, and thereby the expences of calling, and the dues of each defender's oath are ſaved, as the expence of the commiſſion is the ſame, whether taken for one or more defenders, and the dues for reporting the oaths upon the commiſſion are leſs than if taken in preſence. 2*do*, It was ſaid, that the defenders were in a miſtake, when they objected, that the proceedings in the forthcoming were irregular; becauſe an action of forthcoming, and an action againſt debtors, are widely different. In a proceſs againſt debtors, there are as many actions as there are defenders; whereas, whatever be the number of arreſtees called in a forthcoming, it is only conſidered as one action; and, therefore in practice, the defenders, though never ſo many, are always proceeded againſt at once. And, as to the blanks in the act and commiſſion, they were ſaid to be of no moment; becauſe,

becauſe, in practice, when an act is extracted, for the purpoſe of circumducing the term, the blanks therein are never filled up. The act, in this caſe, was not extracted till after the term for reporting the commiſſion was elapſed; and as it was, therefore, only done in order to circumduce, no good reaſon could be aſſigned why it was neceſſary to fill up the blanks therein, and in practice it never was done. And, in anſwer to the proceſs being aſleep when the circumduction was obtained, and decreet pronounced, it was obſerved, that that defence could not be recurred to with any degree of ſucceſs, when the time from 1ſt November 1745, to 1ſt June 1746, is deducted, in terms of the ſtatute of the late King, by which the legiſlature provides, that that time ſhould not be computed in any preſcription eſtabliſhed with reſpect to judicial proceedings.

Obſerved from the bench, That the compearance of a lawyer for Lord Roſs, amongſt the reſt, undoubtedly made the decreet ſought to be reduced a decreet *in foro*; but there were ſufficient grounds for reducing it, both on account of the blanks in the commiſſion for taking the oaths of the arreſtees not being filled up before extracting, and likewiſe, of the proceſs being aſleep when the circumduction was obtained, as the act of the late King had no connection with this caſe.

'The Lords ſuſtained the reaſons of reduction, and aſſoilzied the de-
'fenders,' &c.

J. S. *tertius.*

No. XLIX. *December* 17. 1766.

DAVID RUSSEL writer in Edinburgh, Truſtee for the Creditors of James Ewart;

Againſt

JAMES PAISLEY of Craig, and JOHN LITTLE Merchant in Langholm.

A Bond not having the date, place of ſigning, and deſignations of the witneſſes filled up in the teſting clauſe, null, though the parties acknowledge the deed was ſubſcribed by them.

JOHN ARMSTRONG in Wrae, having obtained a caſh-accompt with James Ewart, he as principal, and the defenders as cautioners, granted a joint bond for what ſhould be advanced to Armſtrong. This bond was ſubſcribed by the three obligants and two witneſſes; but the date, place of ſigning, and the names and deſignations of the witneſſes were not filled up in the teſting clauſe.

Ewart advanced a conſiderable ſum to Armſtrong, and having become bankrupt, the purſuer brought an action againſt Paiſley and Little, for repayment. The defenders acknowledged their ſubſcriptions, but *plead-*

ed,

ed, That the bond was null, reſting chiefly upon the omiſſion to inſert the names, and deſignations of the witneſſes as a nullity by the act 1681. The Lord Gardenſton Ordinary, 'found the cautionary obligation pur-'ſued on not obligatory, and aſſoilzied.'

The purſuer reclaimed, and *contended*, That neither the date nor mention of the place of ſubſcribing, were eſſential by our law, upon the authority of the following deciſions, 11th December 1621, Hamilton *contra* Sinclair; 7th June 1666, Crawford *contra* Duncan; 1ſt July 1712, Macaldownie, *contra* Graham; 21ſt July 1711, Ogilvie *contra* Baillie, 4th July 1709, Vallange *contra* M'Douall.

With regard to the other defect of the deed, it was *pleaded*, That the act 1681, having been only meant to prevent the falſification of ſubſcriptions to deeds which had not been truly ſubſcribed, ought not to be applied to this caſe, where both the parties and witneſſes are alive, and their ſubſcriptions acknowledged. Lord Bankton lays it expreſsly down, that there is no place for the ſanction of the act, in ſuch a caſe; and ſo it was found 26th December 1695, Beatie *contra* Lamie, obſerved by Fountainhall.

The act does not deny action upon ſuch deeds as are defective in any of the ſolemnities thereby required. It only affords an exception; which exception may be barred by homologation, as has been repeatedly found, V. *Dict.* v. 2. p. 352. 551. 552. and if the exception may be barred by homologation, which is only an *implied* acknowledgement, it ought *multo magis* to be barred by an expreſs acknowledgement of the obligation.

'The Lords refuſed the petition, and *adhered*.'

A. R.

Act. *Nairn.*

No. L. *January.* 20. 1767.

JAMES DEWAR of Vogrie;

Againſt

Mr WILLIAM FRAZER junior, writer to the ſignet.

A proprietor may build a draw-kiln for burning lime on any part of his property, altho' thereby a conterminous heritor's property ſhould be hurt.

MR FRASER was proprietor of a houſe and ſome lands a few miles to the ſouth of Edinburgh, where he and his family were in uſe to reſide during the vacations.

Mr Dewar of Vogrie was proprietor of ſome lands in Mr Fraſer's neighbourhood, a part of which run out into a point, reaching within 324 feet of Mr Fraſer's manſion-houſe.

Upon

Upon the extremity of this point, neareſt to Mr Fraſer's houſe, Mr Dewar ſet about building two draw-kilns for burning lime. Mr Fraſer ſtopt the work by a ſuſpenſion, which came to be diſcuſſed before the Lord Auchinleck Ordinary; who, after having ordered a plan of the grounds, found, 'That as Mr Fraſer the ſuſpender, has no ſervitude upon Mr Dewar's grounds, and that the place where Mr Dewar propoſes to ſituate his draw-kiln, appears, in ſundry reſpects, to be moſt commodious for him, and no ways *in æmulationem* of Mr Fraſer, although it will be attended with inconveniences to him, Mr Dewar has right to carry on his work, and allows the ſame to proceed, and repels the reaſons of ſuſpenſion, and decerns.' But his Lordſhip afterwards reported the cauſe to the court upon informations.

Pleaded for Mr Dewar: The place where he propoſes to build his kiln, although upon the neareſt part of his lands to Mr Fraſer's houſe, is in ſundry reſpects the moſt convenient ſituation he can have, and therefore cannot be conſidered as carried on *in æmulationem* of Mr Fraſer; and that being the caſe, although it ſhould be inconvenient for Mr Fraſer, or diſagreeable to him, that is not ſufficient to prevent the work from being carried into execution, as every proprietor has the undoubted right of uſing his property in the way moſt for his own advantage. And Mr Dewar will reap conſiderable profit from this work; ſo that, although it ſhould be attended with ſome loſs to Mr Fraſer, Mr Dewar is undoubtedly entitled to carry it on, as Mr Fraſer can pretend no ſervitude over Mr Dewar's lands, and the following authorities were referred to: Bankton, vol. 1. p. 678. *Voet. lib.* 39. *tit.* 2. § 5. *l.* 21. *ff. de aqua et aquæ pluviæ arcendæ*; *l.* 26. *ff. de damno inf.*; *Zoeſ. ad Pand. lib.* 39. tit. 3. §. 4. & 5.; Sir Robert Gordon *againſt* Grant of Knockando, January, 19. 1765; Clark *contra* Gordon, July 8. 1760; Millar *contra* Lindſay 1740.

Anſwered for Mr Fraſer, He did not contravert the general principle laid down by Mr Dewar, of proprietors being at liberty to uſe their property in the way moſt for their own advantage. But ſuch right was ſubject to exceptions both from law and equity, *l.* 206. *ff. de reg. jur.* and thence, in many caſes, mutual obligations aroſe between the proprietors of conterminous tenements, whereby the one is prevented from doing any thing *in æmulationem* of the other. That the point fixed by Mr Dewar, for building his kiln upon, is the very extremity of his property, and the neareſt to Mr Fraſer's houſe. That there was no neceſſity for building his kiln upon that point, as it might be built in other places to equal advantage. That, beſides the damage which would be done to Mr Fraſer, building a draw-kiln upon that place would be a public diſadvantage, being juſt upon the ſide of the turnpike-road.

In the preſent caſe, Mr Fraſer does not inſiſt, that Mr Dewar ſhall not build any draw-kilns; all that he deſires is, that the propoſed ſtance or ſituation of them may be altered, as otherwiſe his houſe will be altogether uninhabitable, on account of the ſmoke and noiſome ſmell and vapours, which will proceed from ſaid draw-kiln, if Mr Dewar ſhall be allowed to erect it on the ſpot he propoſes. That this caſe is very different from thoſe in which one neighbour, by operations carried on upon his own property, may deprive another of an advantage which he had formerly enjoyed, as depriving him of a proſpect, by building houſes

or ſuch like. For, in this caſe, an actual damage is done by the one party to the other, which law will not admit of; *l.* 8. §. 5. *ff. Si ſerv. vind.*; Burrows reports, p. 333.; Fleming *contra* Urie, June 24. 1750; Kinloch *contra* Robertſon, June 20. 1756.

The Lords adhered to the Lord Ordinary's interlocutor.

For Fraſer, Dav. Dalrymple. *For* Dewar, Geo. Wallace. Lord Auchinleck Reporter. *Clerk.*

A. E.

January 21. 1767.

No. LI.

HELEN BINNING

Againſt

JAMES BINNING.

Children predeceaſing their father, the proviſions made for them in the father's ſettlement goes to grand-children, though heirs not mentioned.

IN 1733, James Binning executed a deed of ſettlement of his affairs, giving certain liferent-proviſions to his wife, and portions to his younger children; he nominated his wife, Helen Glendinning, ſole executrix, with the burden of his debts and aliment of the younger children; and then, with conſent of James Binning, his eldeſt ſon, he binds and obliges himſelf, his heirs, &c. to content and pay to Patrick and Margaret Binnings, his younger children, 500 merks Scots each, at the firſt term after their mother's death; and, failing either of the ſaid children by death, before majority, the portion was to divide equally between the eldeſt ſon and ſurviving child. Then follows a clauſe diſpenſing with the not delivery, and declaring that the ſame ſhould be as ſufficient to the wife and younger children as if a ſeparate diſpoſition, or bonds of proviſion, had been delivered to them reſpectively.

Soon after executing this deed, Patrick Binning, the ſecond ſon, married; but there was no contract of marriage or ſettlement entered into by him on that occaſion. Patrick did not long ſurvive his marriage, having died many years before his father or mother, leaving one daughter, Helen, who, upon her father's death, was carried to her grand-father's houſe, where ſhe reſided during his life.

During the life-time of Helen Glendinning, the grand-mother, the younger children had no claim for their reſpective portions, as the funds were liferented by her; but, upon her death in 1762, Helen Binning, the daughter of Patrick, brought an action againſt her uncle James, her father's elder brother, concluding for payment of the ſum of 500 merks, as the portion ſettled by her grand-father upon her father, Patrick. The

Lord

Lord Ordinary ſuſtained the defence, and aſſoilzied. Helen reclaimed to the whole Lords.

Pleaded for James the defender, That Helen's father, in whoſe right ſhe claims, having died before his mother, who liferented the ſubjects, his heirs were not entitled to the ſums provided to him, agreeable to the maxim of the Roman law, that *dies inſertus pro conditione habetur*. And, ſecondly, that as the deed was of a teſtamentary nature, the legacy became void by Patrick's predeceaſing his father, agreeable to the other rule in the Roman law, *quod morte legatarii perit legatum*; and, in ſupport of this, ſundry authorities from the Roman law were quoted; and the deciſion, Bell againſt Maſon, in February 1749, obſerved in the Remarkable Deciſions referred to; and alſo Edgar againſt Edgar, July 1665; Belſches againſt Belſches, 12th February 1677.

Anſwered for Helen, her claim was favourable, being that of an only child for a father's portion, who had got no part of his father's effects, and the defences inſiſted upon did not apply. The firſt, founded upon the maxim of the Roman law, *dies inſertus pro conditione habetur*, can have no effect in this queſtion, as the term of payment, though ſuſpended to a future day, could not render the obligation conditional, unleſs it was uncertain whether the day of payment ſhould ever exiſt, which could not be maintained in the preſent caſe, unleſs it was alledged to be uncertain whether Helen Glendinning ſhould die or not; and if the defender's plea was good, every obligation, however pure when the term of payment was ſuſpended, would reſolve into a conditional obligation, Campbell of Calder againſt Ruth Pollock, 2d December 1717; Dict. vol. I. p. 425; Kelſo againſt M'Cubby, 25th November 1686; Dict. vol. I. p. 424.

As to the ſecond defence, That this 500 merks was of the nature of a legacy in favours of Patrick, and fell by his predeceaſing his father: The defender ſeems to miſapprehend the nature of the deed; for, although the firſt part of it has the appearance of being teſtamentary, yet the latter part of it, which concerns the proviſions to the younger children, is of the nature of a bond of proviſion in favours of thoſe younger children; and as it contains a clauſe diſpenſing with the delivery, it muſt have the ſame force as if a bond of proviſion had been executed and delivered to Patrick. The governing rule in ſucceſſion is the intention of the deceaſed perſon, either expreſſed or preſumed. And this principle has been juſtly eſtabliſhed by the laws of all nations; and it muſt be preſumed, that a father intended the proviſion made to a ſon to extend to grand-children, as no principle can be conceived which would lead a father to provide for his ſon, and yet leave his grand-children deſtitute; and this differences the caſe of children's claims for their fathers proviſions, from all the other caſes reſorted to by the defender; *l.* 102. *ff. De Cond. Demonſtrat.*; Magiſtrates of Montroſe againſt Robertſon, 21ſt November 1738; Dict. vol. I. p. 430.

'The Lords altered the Lord Ordinary's interlocutor, and found the 'defender liable.'

For Helen, Henry Dundas. *For* James, Archibald Cockburn. *Clerk.*

A. E.

No. LII. *January* 21. 1767.

JOHN MAXWELL

Againſt

JAMES MAXWELL of Kirkconnell.

Action ſuſtained upon a bill which had lain over 31 *years.*

IN February 1734, James Maxwell of Kirkconnell accepted a bill to William Maxwell of Craſwadda for L. 38 Sterling, payable 1ſt May thereafter. This bill was allowed to lie over, without being proteſted or regiſtrated, or any diligence done on it, till ſummer 1765; when an action for payment was brought, at the inſtance of Craſwadda's executor, againſt James Maxwell then of Kirkconnell, as repreſenting his father James Maxwell, the accepter of the foreſaid bill. The Lord Ordinary decerned for payment; the defenders reclaimed to the whole Lords.

Pleaded for the defender: In all commercial countries bills are limited by very ſhort preſcriptions. In France they preſcribe in five, and, in England, in ſix years; and, although in Scotland there is no expreſs law limiting the indurance of bills to any particular period; yet, from the uniform tract of the deciſions of the court, as well as the opinion of our lawyers, a ſort of preſcription ſeems to be eſtabliſhed, not indeed fixed to any particular period, the time differing according to circumſtances, but conſiderably within the period which this bill has lain over; Lord Stair, B. 4. tit. 42. § 6.; Lord Bankton, Vol. 1. p. 367. § 31.; Erſkine, p. 346. § 11.; Lady Forreſter *contra* Lord Elphinſton, 13th November 1742; Wallace *contra* Lees, 31ſt January 1749; Moncrieff *contra* Sir William Moncrieff, 13th December 1751; Lookup *contra* Crombie, 20th February 1754; Wallace *contra* Murray, 19th January 1759; Stewart *contra* Houſton, 15th July 1760. All which caſes, the defender contended, had been determined by the court, upon the principle, that bills ought not to be ſuſtained as permanent ſecurities, or action ſuſtained upon them after the lapſe of a number of years.

Anſwered for the purſuer: Bills, by the law of Scotland, are probative writings. They have always been conſidered as legal vouchers and grounds of debt, and, as ſuch, have been relied on by the lieges; and no preſcription is known in the law of Scotland, except what is introduced by poſitive ſtatute; and, as there is no ſtatute limiting the preſcription of bills, it neceſſarily follows, that no preſcription can take place againſt them, except the general preſcription of 40 years: That, in all the caſes mentioned by the defenders, in which action had been denied upon bills, although not cut down by the long preſcription, various particular circumſtances occurred which difference them from the preſent

caſe,

caſe, and rendered it highly preſumeable, that theſe bills had been extinguiſhed by payment, which was not the caſe in the preſent queſtion.

'The Lords adhered to the Lord Ordinary's interlocutor.'

A. E.

For *John Maxwell*, *Ro. M'Queen.* For *James Maxwell*, *William M'Kenzie. Clerk.*

No. LIII. *January* 21. 1767.

WALTER COLQUHOUN

Againſt

Duke of ARGYLE.

Action refuſed on a bill which had lain over 39 *years.*

JOHN CAMPBELL of Mamore, in November 1722, accepted a bill to Humfry Colquhoun maltman in Dumbarton, for L. 79 : 7 : 6 Scots, payable at Candlemas 1723.

Mamore died in 1730, and his ſon, now Duke of Argyle, was ſerved heir to him *cum beneficio inventarii.*

In ſummer 1762, Walter Colquhoun, as repreſenting his deceaſed father Humphrey Colquhoun, brought an action againſt the Duke of Argyle, as repreſenting his father Mamore, for payment of the above mentioned bill.

Two defences were pleaded for the Duke againſt this action. 1*mo*, His ſervice upon the inventary, which he alledged was exhauſted; and, 2*do*, the antiquity of the bill, which, he contended, preſumed payment, and excluded any action upon it.

And, in ſupport of the firſt of theſe defences, it was *pleaded*, That the law does not oblige an heir, who enters *cum beneficio*, to value or ſell his eſtate; it is enough that he gives it up in inventary; and he will be ſafe if he can ſhow, by rational evidence, that this inventary is exhauſted by payments; and if any creditor, at a diſtant period, diſputes the fact, he ought to prove his allegation, as it would be hard to oblige an heir, after a long lapſe of time, to enter into a regular proceſs for valuing his predeceſſor's eſtate, or to aſſign the inventary, which, it appears, was long ago exhauſted, and no proof of the contrary offered; and, in this caſe, there was produced vouchers to ſhow that the Duke had paid debts of his father's to the extent of 30 years purchaſe of the rental of the eſtate; which, it was contended, was full evidence that the inventary was exhauſted.

In ſupport of the other defence, it was *pleaded*, That, although there was no ſtatutary preſcription of bills in this country, yet, in many queſtions which have occurred, action has been refuſed upon bills after long taciturnity; and no caſe can be pointed out where ever action was ſuſtained upon a bill after it had lain over for ſo long a period as that now ſued on, within a few months of the long preſcription; more eſpecially, when ſuch queſtions occur between heirs after the death of the original parties, as is the caſe here; and a number of deciſions were mentioned, in which the court had refuſed action on bills of much more recent date.

Anſwered for Colquhoun the purſuer: To the *firſt* point, The law does not allow an heir of inventary to hold his predeceſſor's eſtate at the value put upon it by himſelf. It is true, ſuch heir may bring an action againſt the creditors of his predeceſſor for valuing the ſubject of his inventary; and, in that caſe, he would be no farther liable than the extent of the proved value, as was found in the caſes, Gray *contra* M'Call, 6th July 1733; and Murray *contra* Creditors of Pilmuire, 17th February 1736. But the creditors may, if they inſiſt, bring the eſtate to a ſale, as was found, 12th July 1738, Heirs of Strachan of Glenkindy *contra* his creditors; and therefore, an heir of inventary, who holds his predeceſſor's ſubjects without properly aſcertaining the value of them, muſt be bound, either to pay his predeceſſor's debts, or aſſign the inventary to any creditor who demands his payment.

Upon the *other* point, it was *pleaded* for the purſuer, That the lapſe of time was, at any rate, a very unfavourable defence; but, as bills were obligatory writs acknowledged by the law, and limited by no ſhort preſcription, they muſt of courſe be effectual for 40 years; and that all the deciſions founded upon by the defender proceeded upon circumſtances which gave reaſon to preſume payment, which is not alledged in the preſent caſe; and, therefore, decreet ought to go againſt the defender.

The Lords found, 'That, *poſt tantum temporis*, no action lies upon the bill in queſtion; and therefore aſſoilzied, and decerned.'

A reclaiming petition for Colquhoun was refuſed, without anſwers.

A. E.

For the *Duke of Argyle*, *Ilay Campbell.* For *Colquhoun*, *Coſmo Gordon.* *Clerk.*

No. LIV.

No. LIV. *January* 21. 1767.

JOHN and HUGH FINLAYS Merchants in Glaſgow,

Againſt

JAMES AITCHISON and WILLIAM MOFFAT.

Evidence neceſſary for declaring a bankrupt, in terms of the Act 1696.

JOHN Romanis merchant in Lauder, February 1. 1762, granted an heritable bond to James Aitchiſon, on a houſe belonging to him, for L. 40. Sterling, and on this bond infeftment followed next day.

On the 4th February 1762, Romanis granted another heritable bond to William Moffat, on a burgeſs-acre in Lauder for L. 25 Sterling, on which infeftment was taken the day it was granted.

On the 11th February 1762, Romanis executed a truſt diſpoſition of all his moveable ſubjects, in favours of certain truſtees, of whom Robert Henderſon meſſenger was one, upon which diſpoſition, an inſtrument of poſſeſſion was taken next day.

John and Hugh Finlays being creditors to John Romanis in a bill for L. 32 Sterling, raiſed horning, and tranſmitted it with an inhibition, on the ſame ground of debt, to Robert Henderſon the meſſenger, who, unknown to the Finlays, was one of Romanis's truſtees, with orders to execute the diligence immediately.

Henderſon delayed executing the Finlays diligence; but, in conſequence of a poinding and other ſteps, he, as truſtee, had collected conſiderable ſums belonging to Romanis, upon which the Finlays uſed arreſtments in the hands of Henderſon, and the other truſtees, and having got their diligence executed by another meſſenger, upon the charge elapſing, a caption was taken out againſt Romanis; upon which, on the 12th March 1762, an execution was returned, bearing that the meſſenger had broke open, and ſearched Romanis's houſe, but could not find him; and had reaſon to believe he made his eſcape by a back door.

Poſterior to theſe proceedings, on the 7th, December 1762, Romanis, with conſent of his truſtees, and William Moffat, expoſed the burgeſs-acre, in which Moffat had been infeft in conſequence of his bond, to roup; and the ſame was purchaſed by a couſin of John Romanis; and, upon a narrative of having received the price, Romanis diſponed the acre to his couſin.

John and Hugh Finlays brought an action upon the ſtatute 1696, concluding for reduction of the foreſaid heritable bonds and infeftments granted by Romanis to Aitchiſon and Moffat, as being within 60 days of his bankrupty, and in defraud of his creditors.

The Lord Coalſton Ordinary allowed a proof, to ſhow that Romanis had fled or abſconded, to prevent the execution of the diligence, and afterwards

terwards pronounced an interlocutor, finding it proved, that Romanis had abſconded, and therefore reducing the bonds in favours of Aitchiſon and Moffat, as granted within ſixty days of Romanis's bankruptcy. But afterwards his Lordſhip took the cauſe to report to the court.

Pleaded for John and Hugh Finlays purſuers, The act 1696 intended that it ſhould be in the power of creditors to fruſtrate the partial deſigns of bankrupt debtors, by making their bankrupcy notorious, whether the debtor would or not; and therefore the act does not ſtop at the alternatives of impriſonment, forcibly defending or entering into ſanctuary, as it might have been in the power of a debtor to have avoided theſe alternatives, by moving from his ordinary place of reſidence; and therefore the act adds, 'or flee or abſcond for his perſonal ſecuri-'ty.' That from the execution and depoſition of the meſſenger, in this caſe, it appeared, that he had been refuſed acceſs into Romanis's houſe, to ſearch for him, and that, upon breaking open the door, and ſearching the houſe, Romanis was not to be found; and this they contended was ſufficient to bring him within the act 1696; as Romanis, though allowed a proof, had not ſhown that his abſence was owing to any other cauſe then flying from diligence; and, in ſupport of this, a deciſion, Dickſon *contra* Moodie, November 14. 1764, was referred to.

Anſwered for the defenders: It is indeed true, that Romanis happened to be from home the night on which the meſſenger ſearched the houſe; but that was purely accidental; and a ſingle act of abſence at the time a ſearch happens to be made, can never be conſtrued abſconding in the ſenſe of the act of parliament, which expreſsly requires abſconding, for perſonal ſecurity; that an execution, although it may be evidence of the facts that happened on the occaſion, and prove either that a perſon could not be apprehended, or was not found in a houſe, cannot be admitted as evidence of any other fact like abſconding, which is extraneous, as the abſence may proceed from various reaſons.

'The Lords found no ſufficient evidence to ſhow that Romanis 'had abſconded, in terms of the act 1696; and therefore 'repelled the reaſons of reduction'.

A. E.

For *Finlays*, *Jo. Maclaurin.* For *Aitchiſon*, *Geo. Wallace.* *Reporter Coalſton.* *Clerk.*

No. LV. *January* 23. 1767.

Sir MICHAEL MALCOLM of Lochore,

Againſt

ALLAN RAMSAY of Kinkell.

Two retours of different parts of the ſame lands, prior to the 1681, *amounting together to* 40 *Shilling, ſufficient evidence of an old extent for a freehold qualification.*

SIR MICHAEL MALCOLM claimed to be put on the freeholders roll for the county of Kinroſs, upon the lands of Bins, and for inſtruc-

ing

ting, that ſaid lands were a forty-ſhilling land of old extent, he produced a retour in the 1666, where one half of them was retoured as a twenty-ſhilling land of old extent; and he produced another retour in the 1620, which proved the other half of the ſame lands to be alſo twenty ſhilling, of old extent; and theſe, joined together, he contended, were ſufficient evidence of a forty-ſhilling land, to entitle him to be inrolled.

It was *objected*, That it was contrary to the ſpirit and intention of the law to allow a forty-ſhilling land to be made up of different parcels: That the evidence of an old extent ought to be contained in one retour; and, upon this objection, the freeholders refuſed to inroll Sir Michael, who applied to the court by a ſummary complaint, in terms of the act of the 16th of the late King.

'The Lords ordered the complainer to be added to the roll; and found him entitled to expences.'

A. E.

For *Sir Michael, Al. Wight.* For *Mr Ramſay, Alex. Lockhart. Clerk.*

No. LVI. *January.* 23. 1767.

ROBERT RANKINE of Colden,

Againſt

ALLAN RAMSAY of Kinkell.

Freeholders cannot alter the order of the roll.

AT Michaelmas head-court for the ſhire of Kinroſs, in October 1766, the only freeholders preſent were, Mr Ramſay of Kinkell, and Mr Rankine of Colden; when Mr Ramſay, ſtanding firſt on the roll, was, by his own caſting vote, elected preſes; and, alledging that Mr Rankine's name had, at a former meeting, been improperly placed in the roll before Colonel Irvine, Mr Ramſay propoſed that the roll ſhould be altered, and Colonel Irvine placed before Mr Rankine; and, Mr Rankine declining to vote, Mr Ramſay, as preſes, ordered the clerk to make up a new roll, in which Colonel Irvine's name was placed before Mr Rankine; and this roll was ſigned by Mr Ramſay, as preſes, and by the clerk, and ingroſſed in the minutes. Mr Rankine applied to the court, by ſummary complaint, praying to be reſtored to his former place upon the roll.

In the anſwers given in for Mr Ramſay, it was *objected*, That the ſtatute 16th of the late King did not authoriſe a ſummary complaint to the court in ſuch a caſe as the preſent; and, therefore, the ſummary complaint was incompetent.

Mr Rankine, to obviate that objection, brought an action of declarator, in which he called Mr Ramſay and Colonel Irvine, and concluded to have it found and declared, that he was entitled to hold the ſame place in the roll he formerly had; which action was taken up along with the complaint.

'The Lords ordered Mr Rankine to be reſtored to his former place 'on the roll.'

A. E.

For *Mr Rankine, Al. Wight.* For *Mr Ramſay, Dav. Graeme.* *Clerk.*

No. LVIII. *January* 27. 1767.

THOMAS and ALEXANDER PETERS Merchants in Glaſgow,

Againſt

ALEXANDER SPIERS, ANDREW BLACKBURN, and others, truſtees for James Dunlop merchant in Glaſgow.

A diſpoſition by a bankrupt, to truſtees, for behoof of his creditors, does not prevent creditors, not acceding, from attaching their debtor's effect, by diligence.

IN July 1763, the ſhip Betſey arrived at Greenock, loaded with tobacco, chiefly on account of James Dunlop merchant in Glaſgow; but having on board 16 hogheads tobacco, for behoof of Meſſ. Thomas and Alexander Peters.

Mr Dunlop having gone to Greenock, on purpoſe to enter his tobacco, Meſſ. Peters wrote him, deſiring he would enter their tobacco at ſame time with his own; the entry was accordingly made, and the entry-duties repaid to Mr Dunlop by Meſſ. Peters, who not being able to obtain from Mr Dunlop either their tobacco or its value, brought an action againſt him, concluding either for delivery of the tobacco, or payment of L. 250 Sterling as the value. And, upon the dependence, they, in September 1764, arreſted in the hands of Joſiah Corthin, collector of the cuſtoms at Port-Glaſgow, as debtor to Dunlop.

In November 1763, Dunlop executed a diſpoſition of his whole eſtate real and perſonal, in favours of Meſſ. Spiers, Blackburn, and others, as truſtees, for behoof of his creditors; and, a few days after executing this truſt-deed, Dunlop was rendred bankrupt, in terms of the act 1696 by diligence executed by the direction of the truſtees, in order to prevent any undue preference among the creditors.

The Meſſ. Peters having obtained decreet againſt Dunlop, brought a proceſs of forthcoming againſt Corthin, who appeared, and acknowledged,

ledged, that at the time of Meſſ. Peters arreſtment, he had in his hands L. 291 : 16 : 0. belonging to Dunlop, as debenture duties upon tobacco. The Meſſ. Peters inſiſted for decreet of forthcoming againſt Corthin, who made no oppoſition; but Meſſ. Speirs and Blackburn, Dunlops truſtees, appeared in the forthcoming, and, founding upon the truſt-right, inſiſted to be preferred to the Meſſ. Peters, upon the ſum in the hands of Corthin; and the Lord Ordinary preferred the truſtees.

Meſſ. Peters brought an action of reduction, founded upon the acts 1621 and 1696, for ſetting aſide the truſt-right; and this action of reduction being conjoined with the proceſs of forthcoming, the Lord Ordinary, upon adviſing a repreſentation for Meſſ. Peters, with anſwers for the truſtees, July 18. 1766, found, 'In reſpect it is not denied, that the 'conveyance to the truſtees was granted after James Dunlop became 'bankrupt, for the behoof of his creditors, and that the Meſſ. Peters are 'neither parties, nor have aceeded to it, they are not thereby barred 'from the benefit of their diligence; therefore alters the former interlocutor, and prefers the Meſſ. Peters, upon their arreſtments, to the 'ſums arreſted, and decerns in the preference, and alſo againſt the defender Joſiah Corthin and James Dunlop, the common debtor for his 'intereſt, for payment accordingly.'

The truſtees applied to the Lord Ordinary, for an alteration of the above interlocutor; to which the Lord Ordinary, November 21. 1766, adhered, 'In reſpect that the Meſſ. Peters have formerly condeſcended 'on certain diligences againſt James Dunlop, which rendered him bankrupt, in terms of the act of parliament 1696, ſaid to be in the hands 'of the truſtees, which is not denied by them.'

The truſtees reclaimed to the whole Lords, and *pleaded*, That the meaning of the act 1696 was to prevent fraudulent conveyances, by bankrupts, in prejudice of their juſt and lawful creditors, but not to make void or ineffectual deeds executed for the benefit of the whole creditors. That nothing was more equitable, than a fair and equal diſtribution of a bankrupt's effects among all his creditors. That, where the preference of creditors is eſtabliſhed by the priority of diligence, the conſequence always muſt be, that creditors who reſide in the neighbourhood of their debtor, will ſecure themſelves a preference to other creditors, equally onerous, who reſide at a diſtance: That, in this caſe, the diligence founded on by the Meſſ. Peters was poſterior to the-truſt right: That the tobacco, from the value of which the ſum *in medio* aroſe, though for form's ſake entered in name of Dunlop, was in fact ſold by the truſtees, and could not, therefore, be affected by the Meſſ. Peters diligence againſt Dunlop, poſterior to the truſt-right; as was determined by the court, Super againſt Smith, January 1756: That, in the preſent caſe, it was only in conſequence of the diligence done by the truſtees themſelves, that Dunlop could be brought under the act 1696, and to make uſe of theſe diligences, executed for behoof of the whole creditors, for the purpoſe of cutting down the rights of theſe creditors, would be repugnant to every principle of juſtice and equity.

Anſwered for the Meſſ. Peters: Experience has ſhown, that truſt-diſpoſitions ſeldom anſwer any good purpoſe; the act 1696 expreſsly enacts, that all voluntary rights granted by bankrupts, within 60 days of their bankruptcy, to any of their creditors, either in ſatisfaction or ſecurity

curity of their debts, ſhall be void and null, that the truſtees could not diſpute, but Dunlop was notourly bankrupt, in terms of the act 1696, within leſs than 60 days of the date of the truſt-right; that it was neither juſt nor equitable, that by a deed of the bankrupt's, a creditor, without his own conſent, ſhould be deprived of the aid of the law, for recovering payment from his debtor, or be obliged to truſt to the activity and fidelity of thoſe whom the bankrupt might think fit to truſt with the management of his ſubjects; that ſuch truſt-diſpoſitions had never been ſuſtained by the court to the prejudice of creditors, who had not acceded thereto; Snee and company, againſt truſtees of Michael Anderſon, July 12. 1734; Elizabeth Mudie againſt truſtees of Robert Strachan 1764. That theſe debenture-duties muſt ſtill be conſidered as *in bonis* of Dunlop, and affectable by the legal diligence of his creditors.

'The Lords, upon adviſing the petition and anſwers, adhered to the 'Lord Ordinary's interlocutors'.

A. E.

For *Meſſ. Peters, William Wallace.* For *the Truſtees, Alex Wright, and Advocatus.*

This judgement was affirmed upon an appeal.

No. LI. *Eod. Die.*

ANDREW FINNIE

Againſt

THOMAS TROTTER of Morton-hall.

An outgoing tenant, whoſe term of removal was Michaelmas, found not intitled to diſpoſe of any of the dung collected by him, previous to the beer-ſeed time of the year of his removal.

ANDREW FINNIE tackſman of the lands of Swanſton, having removed therefrom at Michaelmas 1764, left there a quantity of dung collected by him from November 1763 to the time of his removal.

After his removal, he brought an action againſt Mortonhall his maſter, and Mitchel the incoming tenant, for payment of the value of the dung.

Pleaded in defence: That Finnie by his tack was bound to labour and manure his farm properly, which, if he had done, he would have laid the dung collected from November 1763 to Whitſunday 1764, on his beer land; and therefore, although he had not done ſo, but taken a crop of beer without dunging the land at all, his miſlabouring the ground in that manner

ner could not found him in an action, for payment of that dung, which, if he had managed properly, ought to have been laid upon his beer-land at Whitſunday 1764.

2*do*, It was *pleaded*, That although the tack had contained no ſuch obligation, yet, from the nature of the contract, an outgoing tenant is bound to labour the ground, the laſt year of his leaſe, in the ſame manner he had been in uſe to do, during the former years, or if he had been to continue in poſſeſſion.

And, 3*tio*, It was *contended*, That as the farm which the purſuer had poſſeſſed, was a *ſteelbow* farm, ſo far as reſpected the ſtraw, it followed of courſe, that the dung could not be carried off, in conſiſtency with the obligation thence ariſing.

Anſwered, for the purſuer: That the clauſe in the tack, referred to by the defender, muſt be underſtood according to the cuſtom of the country; which has always been to lay the whole dung made through the year, upon the wheat-land, and none at all upon the beer-land; which he accordingly followed, by laying the whole dung, made from November 1762, upon his wheat-land ſown in November 1763; and therefore the dung he made after November 1763, was not laid upon the beer-land in ſpring 1764, becauſe it never had been his practice, nor the practice of his neighbours.

2*do*, The purſuer denied, that he had ever laboured the farm otherways in former years, than in the laſt year.

3*tio*, It was ſaid, that the argument ariſing from the third defence, went ſo far, as to deprive the purſuer of the price of the dung collected after beer-ſeed time, as well as before it, which the defenders themſelves had yielded he was entitled to.

'The Lord Ordinary found the purſuer intitled only to the value 'of the dung made after beer-ſeed time, the year he removed 'from the lands.'

To which interlocutor, the Lords, on a reclaiming petition and anſwers, adhered.

J. S. Tertius.

Actor Maclaurin. *Alter Rae.*

No. LIX. *February* 3. 1767.

COUNTESS DOWAGER of Caithneſs.

Againſt

The COUNTESS *and* EARL FIFE *and* SIR JOHN SINCLAIR *of Stevenſon.*

Aliment of a widow, until the firſt term after her husband's death, mourning, and jointure-houſe, if they fall to be paid by the heir or executor.

ALEXANDER, late Earl of Caithneſs, by contract of marriage with Lady Margaret Primroſe, became bound to infeft her in an

 annuity

annuity of 4000 merks, out of his lands, payable at Martinmas and Whitſunday equally, the firſt term's payment to commence at either of the terms that ſhould firſt happen after his deceaſe; and he further obliged himſelf, his heirs, and ſucceſſors, to provide her in a convenient jointure-houſe.

Some time after the marriage, a voluntary ſeparation took place between them, and thereupon the Earl became bound to pay to the Counteſs L. 1000 Scots yearly, which, upon the Earl's ſucceeding to his brother in the eſtate of Murkle, was, upon a proceſs brought by the Counteſs, increaſed to L. 200 Sterling yearly.

Alexander Earl of Caithneſs died on the 9th December 1765. His real eſtate, which was very conſiderable, he ſettled on Sir John Sinclair of Stevenſon, and he was ſucceeded in his perſonal eſtate (which was alſo conſiderable) by his only child, Dorothea, Counteſs of Fife.

The Counteſs-dowager of Caithneſs brought an action both againſt her huſband's heir, and executor, concluding, that either, conjunctly or ſeverally, or one or other of them, ſhould be decerned, *1mo*, To pay to her L. 300 in name of aliment, from the day of her huſband's death, to Whitſunday 1766, the firſt term at which her liferent-annuity fell due. *2do*, In payment of L. 600 in name of mournings; and, *3tio*, To provide her a convenient jointure-houſe, or otherways to pay her L. 100. yearly, in place thereof.

It was not much diſputed, that the Counteſs had a right to make theſe claims; but the extravagancy of them was objected to. It was alſo *pleaded* againſt her claim for aliment, That it could not be ſuſtained, in reſpect that the Counteſs was living in a ſtate of ſeparation from the Earl, at the time of his death, and that the laſt half year's payment of the ſeparate aliment was made to her at Martinmas 1765, which was for the half year immediately ſubſequent; and therefore, that allowing her a further aliment for the half year in which the Earl died, would be allowing her a double aliment: And, *2do*, It was ſaid, that the claim for L. 100. yearly, in place of a jointure-houſe, could not be ſuſtained, in reſpect there was a jointure-houſe in the eſtate of Caithneſs, of which ſhe was intitled to take immediate poſſeſſion, and which Sir John Sinclair was willing to give her. But the chief point pleaded was, whether the heir or the executor fell to be made primarily liable in what ſhould be found due to the Counteſs, of the articles acclaimed by her?

It was *pleaded* by the heir againſt payment of the aliment, That as it was a perſonal claim, it fell naturally to be a burden upon the executry, and ſo it was found in the caſe, Lady Torſappie, *contra* Laird Torſappie, December 20. 1662; and it was ſaid, that to find otherways, might infer, in certain caſes, manifold abſurdities. For inſtance, ſuppoſe that the widow had a right to the liferent of the whole of her huſband's real eſtate, the rents becoming due at the next term, would belong to the liferentrix, in virtue of her liferent; ſo that her aliment, for the time before her jointure came to take place, would be naturally a burden upon the executry, and, in the caſe ſuppoſed, the heir would have nothing wherewithal to ſatisfy the claim.

2do, It was ſaid, that the claim for mournings being perſonal, it undoubtedly fell to be paid by the executors; and,

3tio, It

3*tio*, It was contended, That the obligation to provide a jointure-houſe ought likewiſe to be a burden upon the perſonal eſtate, providing it was found that the Counteſs was not obliged to accept of the houſe offered her, but was intitled to inſiſt for a ſum of money in place thereof; for, though an obligation to purchaſe a real right is heritable *quoad creditorem*, yet it is moveable, *quoad debitorem*; and ſeveral inſtances from the dictionary of Deciſions, vol. 1. p. 369. were appealed to, to ſhow, that it has been often found by the court, that, where a huſband has become bound, by his marriage-contract, to employ a ſum of money on land or annualrent to himſelf and his wife, and the children to be procreate betwixt them, that ſuch obligation was moveable, *quoad debitorem*, and performable out of the defunct's moveable eſtate, which was ſaid to be ſimilar to the preſent caſe; becauſe, if an obligation to ſecure a wife in a liferent-annuity out of lands, is a perſonal obligation, affecting the moveable eſtate of the debtor, no reaſon could be given why an obligation to provide a wife in the liferent of a houſe, ought not likewiſe to be a burden upon the perſonal eſtate of him who is debtor in the obligation.

It was not diſputed by the executor, that the ſum which was to be allowed by the court for mournings to the Counteſs-dowager, was primarily a burden upon the executry: But it was *pleaded*, That the aliment fell to be a burden upon the heir, as having a *tractum futuri temporis*, commencing from the death of the huſband, and conſequently of the nature of a jointure, which undiſputably affected the heir; and, to ſhow that it was a debt of that nature, it was ſaid, that, if the Counteſs-dowager had only lived a month after her huſband, the aliment would have been only due in proportion to that time, and not the whole ſum. And,

With regard to the jointure-houſe, it was ſaid that, upon the ſame principles, it could not be doubted that the obligation as to it, or an annual allowance in lieu of it, was preſtable by the heir. If a particular houſe upon the eſtate had been ſpecially allotted to the Counteſs, it muſt undoubtedly have affected the heir; and in the ſame manner an obligation to furniſh or provide a houſe muſt be incumbent on him, as it is a permanent obligation, having clearly a *tractum futuri temporis*, and which muſt be performed during all the years yet to run of the Counteſs's life.

'The Lords found the Counteſs of Caithneſs entitled to an allowance 'for mourning and for aliment, not to be influenced by the *quan-* '*tum* of her jointure or former aliment; and that the executor of 'the Earl was liable in payment of theſe. They alſo found, that 'ſhe was entitled to a ſum in place of a jointure-houſe, and that 'the heir was liable in payment thereof; and remitted to the Or- 'dinary to modify the *quantum*.'

J. S. *Tertius*

No

No LX. *February* 14. 1767.

WILLIAM EWART

Againſt

JOHN GOURLAY.

In an action brought for payment of a debt, the defence of preſcription, founded on the ſtatute of limitations, was eluded by an offer to prove a promiſe of payment by witneſſes, within the years of preſcription.

JOHN, an Engliſhman, having become indebted to William, in the year 1757, in a ſum of money paid by him for John, he, William, in 1765, obtained a border-warrant from the ſheriff of Berwickſhire, and did arreſt the perſon of John, who found caution *judicio ſiſti et judicatum ſolvi.*

William thereafter inſiſted in an action againſt him and his cautioner for payment.

Pleaded in defence, That this debt having been contracted in England, fell to be regulated by the laws of England; and, if ſo, it was cut off by the ſtatute of limitations, 21. Ja. I. cap. 16. 2*do*, The defender condeſcended upon certain circumſtances, from which he argued, that a clearance had been made, and the debt diſcharged.

The ſheriff found it preſumed, 'That there had been a total clearance 'betwixt the purſuer and defender; and therefore found the action not 'relevant, after ſo great a diſtance of time, unleſs inſtructed by writ, or 'the defender's oath.'

The cauſe was brought before the court of ſeſſion by advocation, in which it was *argued*, That the defender could not avail himſelf of the defence founded on the ſtatute of limitations, in reſpect the purſuer offered to prove, by ſundry witneſſes, that the defender had acknowledged the debt within the years of preſcription, which, it was ſaid, by the authority of all the Engliſh lawyers, particularly Bacon, title Limitation of actions, Salkeld's Reports, vol. I. p. 28. 29. &c. revived the debt, even after the years of preſcription were run; and if ſo, *multo magis* if within the years of preſcription.

Anſwered, That although the Engliſh lawyers lay it down as a principle, that a promiſe of payment, if proved, bars the defence founded on the ſtatute, yet none of them inſinuate that ſuch promiſe can be proved by witneſſes; and, therefore, it was rather to be preſumed that ſuch proof was not competent, which is undoubtedly the caſe, by the Scots law, and ought to be held as law in the preſent queſtion, more eſpecially as the promiſes are ſaid to have been made in Scotland, where an allegeance of this ſort can only be proved by writ or oath of party.

'The Lords remitted the cauſe to the ſheriff, with an inſtruction to 'allow a proof of the defender's promiſe of payment, by witneſſes.'

J. S. *Tertius.*

Actor Dickſon. *Alter* P. Murray.

No LXI. *March* 5. 1767.

JOHN M'COULL Shoemaker in Edinburgh,

Againſt

ALEXANDER BRAIDWOOD Shoemaker there.

Act the 9th of Queen Ann againſt gaming.

MACOULL having charged Braidwood for payment of a bill of L. 8. Sterling, Braidwood ſuſpended on this ground, That the bill was granted for money won at play, and therefore null by the ſaid ſtatute. Macoull, in a condeſcendence averred, that the greateſt part of it was for furniſhings of different kinds, but acknowledged, that having kept a ſort of public houſe, between 30 and 40 Shillings of it was for liquor, won by him at draughts from the ſuſpender, during the courſe of 18 months, and at many ſittings.

The Lord Gardenſton Ordinary, upon adviſing this condeſcendence, 'ſuſtained the reaſon of ſuſpenſion, founded on the act of Queen Anne, 'That the bill charged on was in part granted for a game-debt. Found 'the ſaid bill void, and ſuſpended the letters *ſimpliciter*, without preju-'dice of any action at the charger's inſtance, for payment of any fur-'niſhings, or advances by him, ſeparate from the game-debt, as ac-'cords.'

The ſuſpender reclaimed, and *contended*, That the act was not meant to reſtrain from play for amuſement, and for trifles. It is entitled, an act againſt *exceſſive and deceitful gaming*. What is exceſſive gaming, is no where expreſsly ſaid in the act, but may be collected from that clauſe which allows recovering of any ſum above L. 10 loſt at one ſitting. This ſeems a key to the ſpirit of the whole ſtatute, and particularly to warrant a correſpondent limitation of the general clauſe, reſpecting ſecurities, founded on by the ſuſpender.

2*do*, It is ſubmitted, whether the preſent caſe does at all fall under the act. In the common caſe there is no value given for money loſt at play. But here the ſuſpender got liquor, and as the charger loſt fully as much as he, the ſum charged for was really no more than the ſuſpender's club, which he ought at any rate to pay.

3*tio*, The bill ought at leaſt to be ſuſtained to the amount of the advances and furniſhings made by the charger.

Anſwered to the *firſt*: The ſtatute only allows recovery where the ſum amounts to L. 10, yet it has declared all ſecurities void, whatever ſum they may be granted for; and there are very ſolid grounds for the diſtinction.

The law allows to play for any ſum under L. 10, provided it be paid in ready money, preſuming that thoſe who are poſſeſſed of ſo much caſh

cannot ſuffer by loſing that ſum. But, if ſecurities were allowed for any ſum at all, they might be multiplied without end, which would be very dangerous, eſpecially to the lower claſs of people.

To the *ſecond*: The ſtatute voids all ſecurities, granted either for money, or *other valuable thing* won by gaming; Nor is there any real difference whether this bill was granted for money loſt at play, or the price of liquor loſt at play.

To the *third*: The ſtatute declares the ſecurity null, where either the whole, *or any part* of the conſideration of ſuch ſecurities, is for money won at play, and ſufficient juſtice is done the ſuſpender, by the reſervation in the Lord Ordinary's interlocutor.

'The Lords adhered.'

A. R.

For *the Charger*, *Wigh* For *the Suſpender*, *Armſtrong*.

No. LXII. *March* 6. 1767.

ROBERT IRVING, ARCHIBALD MALCOLM, and GEORGE WALLACE,

Againſt

MARQUIS of Annandale, and the Earl of HOPETON his Curator.

The act the 20*th of George* II, *with regard to aboliſhing the clauſe in charters* de non alienando ſine conſenſu ſuperiorum.

IN 1661, the Earl of Annandale granted to Francis Scot a feu of the lands of Balgray. The charter bore to be granted in implement of a former diſpoſition, and contained the following clauſe. 'Et ſimi-'liter, ſi contigerit Franciſco Scot, ſuiſque prædict. vel vendere, alienare, 'aut diſponere hæreditarie et irredimabiliter, terras aliaque ſupra no-'minat. aut aliquam partem earundem, perſonæ vel perſonis quibuſ-'cunque; quod tunc Franciſcus Scot, ſuique prædicti, tenebuntur lega-'lem et realem oblationem earundem facere in præſentia notarii et 'teſtium, ut congruit, nobis, noſtriſque præſcriptis, pro ſumma 2500 'mercarum monetæ prædictæ, et hoc tanquam pro pretio et valore ea-'rundem per nos noſtroſque antedictos, pro iiſdem, dicto Franciſco Scot 'ſuiſque prædictis ſolvend. per ſpatium 8 dierum ante quemlibet termi-'num Penticoſtes, aut feſti Martini præcedent. qualibet haereditaria ſeu 'irredimabili alienatione per dictum Franciſcum Scot ſuoſque prædict. 'terrarum aliorumque ſupra mentionat. vel aliquarum partium earund. 'faciend. Et ſi contigerit nos, noſtroſque prædict. non accipere dict. 'oblationem, tunc licebit dicto Franciſco Scot, ſuiſque præſcript. vendere, 'alienare, aut diſponere hæreditarie & irredimabiliter, cuique alio per-

'ſonæ

‘ ſonae vel perſonis, ille aut illi videbuntur expediens, eaſdem totas
‘ terras aliaque ſupraſcript. aut aliquam partem earund. et hoc ſine con-
‘ ſenſu noſtro noſtriſque praedict. ad hoc impetrand.; ac etiam ſi contige-
‘ rit dict. Franciſco Scot ſuiſque prædict. aliquo tempore futuro, vendere,
‘ alienare, aut diſponere hæreditarie et irredimabiliter cuique perſonæ
‘ aut perſonis, terras aliaque ſupraſcript. aut aliquam partem earund. ſine
‘ aviſamento et conſenſu noſtro noſtriſque præſcript. ad eandem in ſcripto
‘ obtento aut ante aliquam oblationem, ſic nobis noſtriſque prædict. ut
‘ ſupra faciend. ad recipiendum et emendum eadem ſuper pretium ſupra
‘ ſpecificat. tunc omnes tales hæreditariæ et irredimabiles alienationes,
‘ diſpoſitiones, et jura, infeofamenta, et ſecuritates per dict. Franciſcum
‘ Scot ejuſque prædict. in et ad favorem dict. aliis perſonæ ſeu perſonis
‘ earund. terrarum aliorumque ſupra nominat. ſic concedend. una cum
‘ hac praeſenti charta noſtra et infeofamento deſuper ſequend. poſtea
‘ nullius erunt roboris aut effectus, ac ſi eadem et hæc charta noſtra
‘ nunquam data nec conceſſa fuiſſent, et nullitas ejuſdem admitten. et re-
‘ cipiend. per modum exceptionis ſeu replicationis, abſque ulla judiciali
‘ declaratoria, ſeu juris proceſſu, deſuper ſequen.’

Thomas Thomſon having acquired right to two adjudications led againſt James Scot, the ſon and heir of Francis, firſt obtained a decreet of expiry of the legal, and afterwards irredeemable diſpoſitions from James's repreſentatives, upon payment to them of a certain ſum of money.

Thomas Thomſon having conveyed the lands in truſt for certain purpoſes to the chargers, inſiſted for a charter without the clauſe above narrated, as falling under the act the 20th of Geo. II. Lord Hopeton, as curator to the Marquis of Annandale, preſented a bill of ſuſpenſion; and it having been remitted to the Lord Pitfour Ordinary to diſcuſs the reaſons on the bill, his Lordſhip took the cauſe to report upon informations.

Argued for the ſuſpender. The act the 20th of Geo. II. as it deprived ſuperiors, without their conſent, of certain rights and privileges which they had acquired either by the eſtabliſhed law of the country, or expreſs covenant, muſt be conſidered as a correctory law, in the ſtricteſt ſenſe; and therefore is not to be extended to any caſes not expreſsly provided for. It is clear, the clauſe in queſtion does not fall under the words of the ſtatute, which only mentions clauſes *de non alienando, ſine conſenſu ſuperiorum*; but here there is no prohibition to alienate, without the ſuperior's conſent. Neither does it fall under the intention. The preamble bears, that it was only meant to take away ſuch rights as were more burdenſome to the vaſſal, than beneficial to the ſuperior. A prohibition upon the vaſſal to alienate, without the ſuperior's conſent, was evidently of this kind; for, however it might add to the ſuperior's feudal ſtate and authority, or put it in his power to diſtreſs his vaſſal, it could not be the ſource of any real or ſolid benefit to himſelf. The clauſe in queſtion is of a very different kind. By it the ſuperior reſerves to himſelf a ſubſtantial patrimonial intereſt, viz. a right to redeem the lands, in caſe the vaſſal ſhall incline to diſpoſe of them. This muſt be conſidered as a part of the price originally paid for the feu, as no doubt the vaſſal would have paid a higher conſideration for his right, had it not been burdened with this condition. Had the ſuperior reſerved an abſolute

right

right of reverſion, there would have been no pretence for bringing the clauſe under the act ; and it cannot alter the caſe, that the reverſion is conditional. Beſides, the act was only meant to relax the connection between ſuperiors and vaſſals, but the clauſe is by no means peculiar to that connection. It may take place in a contract between any two perſons whatever, and in fact the *pactum de retrovendendo et jus* προτιμησεως were known in the Roman law, before the feudal cuſtoms had exiſtence.

Contended for the chargers. The ſcope of the act was not ſo limited as the ſuſpenders maintain. The country had ſuffered much from that dependence and ſubjection vaſſals were by the ancient law kept in to their ſuperiors. It was the purpoſe of the legiſlature to put an end to this dependence, and to diſcharge every clauſe in feudal contracts, that might have that tendency. Hence, though in the preamble, mention is only made of ſimple prohibitions to alienate without the ſuperior's conſent, yet the ſtatutory part diſcharges, in general, all prohibitory clauſes, reſtraining the power of alienation. The clauſe in queſtion is certainly one of that kind. Indeed, when the circumſtances are attended to, the effect of it will be found the ſame as of a ſimple prohibition to alienate without the ſuperior's conſent. The price at which the vaſſal muſt offer the lands to the ſuperior, is but 20 years purchaſe of the preſent rent. Now, as the vaſſal never will offer his lands to the ſuperior, at this rate, more eſpecially, as by wadſetting, or granting heritable ſecurities, he may command a larger ſum ; ſo the lands never will be ſold, unleſs the vaſſal, in terms of the other alternative of the clauſe, obtain allowance from the ſuperior to ſell them to another. The ſame view of the caſe ſhows, that it cannot be ſaid, That any patrimonial intereſt ariſes to the ſuperior from this clauſe, and that it is indeed, in the words of the ſtatute, a clauſe more burdenſome to the vaſſal, than beneficial to the ſuperior.

Replied for the ſuſpenders : It is clear from the ſtatute, that it was only meant to diſcharge the expreſs prohibitions to alienate without the ſuperior's conſent. Upon the charger's conſtruction, it would even cut down the ſtipulations for doubling the feu-duty, or paying a year's rent upon the entry of a ſingular ſucceſſor ; for theſe are, in a certain degree, reſtraints upon alienations. The riſe of the value of the land ought not to have any weight. This is accidental, and the lands might have ſunk in their value, as well as riſen.

' The Lords found the clauſe did not fall under the ſtatute, and ' remitted to the Lord Ordinary to proceed accordingly.'

A. R.

For *the Chargers*, *Croſbie*. For *the ſuſpenders*, *Mr Solicitor*.

No

No. LXIII. *June* 27. 1767.

HELEN STEVENSON

Againſt

COLQUHOUN GRANT.

Competition betwixt an arreſting creditor, who had obtained a warrant to ſell the goods arreſted, and a creditor who afterwards pointed.

HELEN STEVENSON arreſted in the hands of Charles Stewart ſome houſhold-furniture, belonging to James Stewart his father the common debtor, and Charles Stewart deponed, that there was ſome houſhold-furniture in his hands, which belonged to the common debtor.

The Lord Pitfour, before whom the forthcoming depended, granted warrant, authoriſing the judge-ordinary to diſpoſe of the furniture arreſted, by way of public roup, he always making intimation thereof, eight days before the roup, and the ſale to be reported to his Lordſhip; but, before the ſale could be made, Colquhoun Grant executed a poinding, and carried off the whole goods.

A proceſs was raiſed by Helen Stevenſon, founded upon her diligence above narrated, againſt Grant, for having him found liable for the value of the goods, as they ſhould be proved to have been worth, at the time of the poinding; the Lord Ordinary 'Suſtained the defence upon 'the execution of poinding, and aſſoilzied the defender.'

In a reclaiming petition for Helen Stevenſon, in which, from the dates of the different ſteps of procedure it appeared ſhe had not been *in mora*, it was *pleaded*, That an order by a judge to roup arreſted goods ought to be held equivalent to a decreet of forthcoming, when a ſum of money is arreſted; and therefore, unleſs a *mora* had intervened, which could not be alledged, that the furniture could not be carried off by a poinding, while ſhe was *in curſu diligentiae*. It was alſo argued, that as the order for the ſale of goods when arreſted, was the method chalked out by law, for making them effectual to the arreſter, it followed of courſe, that, after a decreet for ſelling ſuch goods was pronounced, the property of the former owner as to the *ipſa corpora* was at an end, nothing remaining in him but a claim againſt the perſon authoriſed to ſell the goods to pay him any balance that remained after ſatisfying the arreſter; and therefore a poinding of theſe goods was totally inept, the property of them not being in the common debtor; and, in ſupport of the above doctrine, Lord Stair p. 392. §. 38. and p. 394. §. 42. was appealed to, as alſo the deciſions, November 8. 1680, Stevenſon *contra* Paul; February 19. 1717, Stark *contra* Ramſay; and February 13. 1735, Muirhead *contra* Corry; in the laſt of which caſes it was ſaid, that the preciſe point in iſſue had been determined.

Anſwered for the defender. It is a principle firmly eſtabliſhed in law, that, in competitions, it is the firſt compleat diligence that gives the preferable right; and, more particularly, that, as arreſtment is but an inchoate diligence, it does not ſtop a poinding of the goods arreſted; and ſo it is particularly laid down by Stair, *lib.* 3. *tit.* 1. § 37. and 42. and Bankton, *vol.* 2. *fol.* 264. § 64. And, if that principle was juſt, it was impoſſible that the warrant to ſell the goods arreſted could poſſibly be deemed equivalent to a decreet of forthcoming, as that order was but a preparatory ſtep towards obtaining ſuch decreet. Therefore it was a miſtake to ſtay, that the property of the *ipſa corpora* of the moveables was transferred from the common debtor to the arreſtee, by obtaining the warrant authoriſing the ſale of the furniture; it might as well be ſaid, that the execution of the ſummons of forthcoming had that effect, which it was impoſſible to maintain; and, even ſuppoſing the goods had actually been ſold, without any poinding having interveened, it was *pleaded*, That it would have been neceſſary for the petitioner to have obtained a decreet of forthcoming, to transfer the price to her in right of her arreſtment, as come in place of the goods themſelves; which plainly ſhewed, that the diligence was not compleated, and therefore that the defender's poinding ought to be preferred. And as to the deciſion in the caſes of Stark againſt Ramſay and Muirhead *contra* Corry, it was *anſwered*, That they were not ſimilar to the preſent queſtion. In the firſt caſe, the goods were carried off *in manibus curiae*, and in the very inſtant they were appretiating; and, in the ſecond caſe, the competition enſued betwixt two diligences that were both incompleat, no actual poinding having ever been executed.

'The Lords altered the Lord Ordinary's interlocutor, repelled the 'defence founded on the execution of poinding, and remitted to 'the Ordinary to proceed accordingly.'

J. S. *ter.*

Actor *Swinton* tertius. Alter *Lockhart.*

No. LXIV.

JAMES THOMSON

Againſt

ELIZABETH WRIGHT.

In a proceſs of damages for breach of promiſe of marriage, the proof of the defence was reſtricted to three years.

IN a proceſs brought at the inſtance of James Thomſon againſt Elizabeth Wright for breach of promiſe of marriage, and for damages thence

thence ariſing, the defences pleaded for her, and offered to be proved, were three: 1*mo*, The purſuer had paſſed himſelf for a man of ſubſtance; whereas he was a bankrupt. 2*do*, He was a ſpendthrift, a drunkard, debauched, and excommunicated. 3*tio*, He was impotent, from being caſtrated. The ſheriff repelled the defence founded on Thomſon's irregularity; but allowed a proof of the bankruptcy and caſtration. Wright having applied by bill of advocation againſt the ſheriff's interlocutor, the Lord Ordinary refuſed the bill, but remitted to the ſheriff, with an inſtruction, to allow her a proof of all the facts ſet forth in her defences; to which interlocutor, on a reclaiming bill and anſwers, the Lords adhered, limiting the proof of character to three years.

J. S. *ter.*

Actor, *Cha. Brown.* Alter, *M'Laurin.*

No. LXV. *July* 1. 1767.

ELIZABETH and MARTHA ROLLANDS,

Againſt

RICHARD ROLLAND.

A deed ſigned by two notaries, but at different places, and before different witneſſes, found not valid, nor ſupportable by a proof of homologation.

GEORGE ROLLAND having purchaſed ſome heritable ſubjects, took the diſpoſition thereof 'to himſelf and his wife in conjunct fee 'and liferent, and to the heirs lawfully procreated, or to be procreated, 'betwixt them, in fee.' After his death, Richard Rolland, his eldeſt ſon, obtained a charter of confirmation of the diſpoſition, and a precept of *clare* from the ſuperior, and was infeft, and died in poſſeſſion of the heritage in the year 1760.

Richard Rolland, his ſon, ſucceeded to him, and, in right of his apparency, continued the poſſeſſion, and uplifted the rents until the year 1764, when the tenants having refuſed to make any further payments, he brought an action againſt them.

In that action compearance was made for Elizabeth and Martha Rollands, his aunts, who produced a ſeiſine in their favours of two thirds of the ſubjects, dated March 1764, proceeding on a diſpoſition, dated 28th September 1750, granted by George Rolland their father, diſponing the ſubject to them, and to Richard, their brother, equally; and thereupon they craved preference to two thirds of the rents.

The

The chief objection ſtated by Richard Rolland againſt the diſpoſition and ſeiſine produced, was, That being ſigned by two notaries at different times and places, and before different witneſſes, it was void by the act 1579. The Lord Ordinary 'repelled the defence proponed for the 'defenders, founded on the diſpoſition to the tenement granted by 'George Rolland to them, and decerned the tenants to pay the rents to 'Richard Rolland.'

Elizabeth and Martha Rollands reclaimed, and *pleaded*, That the act of parliament 1579 having been made ſolely with a view to prevent forgery, it did not appear to be neceſſary that the ſubſcription of the two notaries and four witneſſes ſhould be adhibited *unico contextu*, in order to authenticate the deed; the ſubſcription of one notary and two witneſſes at one place, and another notary and two witneſſes at another place, it was ſaid, made the notaries co-notaries, and the witneſſes co-teſtes to the ſame fact, which ſufficiently verified it, and took off all ſuſpicion of forgery. 2*do*, It was offered to be proved, that George Rolland had often acknowledged the deed in favour of his daughters to be his deed; and it was contended, that ſuch acknowledgement, if proved, was ſufficient to remove the objection ſtated againſt it. And, 3*tio*, it was urged, That, as the diſpoſition to the ſubject, which was trifling, was taken to the heirs of the *marriage in fee*, the ſame, by that deſtination, fell to be equally divided amongſt the children of the marriage; and, in ſupport of that argument, the caſe of Andrew Scott, determined in the year 1760, was appealed to.

Anſwered for Richard Rolland: That the argument uſed for his aunts was directly in oppoſition to the words of the act of parliament 1579, and all the deciſions that had ever followed upon that act. The act itſelf requires, that the two notaries ſhould ſubſcribe, and four witneſſes ſhould be preſent, at the ſame time, otherwiſe the writ to make no faith; and, agreeable thereto, it has always been ſo decided; Dictionary, *voce* Writ. 2*do*, Upon ſuppoſition that the deed executed by George Rolland was not valid, it was *anſwered*, That a proof of his having acknowledged it to be his deed would have no effect. The law has appointed certain requiſites to be obſerved by every perſon who transfers his heritage in order to make that transference valid; and if theſe requiſites are not complied with, the deed will be good for nothing, however it is afterwards acknowledged by the granter; if a contrary doctrine was to prevail, the conſequences are plain. Our whole ſyſtem of law, with regard to the formality of writings, would be overthrown, which the wiſdom of ages has found neceſſary to require in the executing of deeds of importance. And, with regard to the laſt argument, it was *anſwered*, That a proviſion of an heritable ſubject to the heirs of a marriage undoubtedly carried that ſubject to the eldeſt ſon, as heir of the marriage, excluſive of all the other children. The diſtinction betwixt heirs of a marriage and children of a marriage is now well underſtood in our law. When an heritable ſubject is provided in a contract of marriage to the heir of a marriage, the law points out the eldeſt ſon to be the heir; in the other caſe, the maker of the deed excludes the legal ſucceſſion, and the younger children are admitted to an equal

ſhare

ſhare; and it was ſaid that the caſe of Scott did not contradict the doctrine, becauſe it was circumſtantiate.

'The Lords adhered.'

J. S. *ter.*

Actor, *M'Queen.* Alter, *Geo. Cockburn.*

No LXVI. *July* 22. 1767.

JOHN LAYCOCK of Bradford, in the County of York,

Againſt

THOMAS CLARK Leather-Caſe-maker in Edinburgh.

Execution for coſts awarded by a foreign decree.

THOMAS CLARK, upon the ſuppoſition that he had diſcovered the art of manufacturing leather into ſnuff-boxes and pen-caſes, and likewiſe the method of preparing it ſo as to make it fit for theſe purpoſes, obtained a patent in 1756, under the uſual condition, 'that it ſhould 'be null, if it ſhould appear contrary to law, prejudicial to his Majeſty's 'ſubjects in general, or that the ſaid invention was not a new inven-'tion as to the public uſe and exerciſe of it in England.'

Laycock having made and ſold ſnuff-boxes and pen-caſes of the ſame kind with thoſe made by Clark, Clark ſued him in an action of treſpaſs upon the caſe before the court of King's-bench; and the queſtion having been remitted to a jury, Laycock produced evidence, that theſe articles had been manufactured prior to the period when Clark ſaid the diſcovery was made by him, upon which the jury returned a verdict, finding Laycock 'noways guilty of the premiſes laid to his charge.'

Upon this the court aſſoilzied Laycock, and alſo decreed, that the ſaid 'John recover againſt the ſaid Thomas L. 70 for his coſts and charges, 'according to the form of the ſtatute in the like caſes made and provi-'ded.'

The ſtatute referred to was ſaid to be the 23d Henry VIII. cap. 15. which enacts, That if, in an action upon the caſe, the plaintiff be non-ſuited, he ſhall pay coſts, and if he ſue *in forma pauperis*, he ſhall ſuffer ſuch puniſhment as the court ſhall direct.

Laycock having brought an action in this court againſt Clark, it was *argued* for Clark, That though, *ex comitate*, a foreign decree may be preſumed juſt, when ſuch decree is pronounced by the judge upon due conſideration of the merits of the cauſe, the caſe is very different where the decree is pronounced in conſequence of a foreign ſtatute, which enacts, that the plaintiff ſhall pay coſts, if non-ſuited, in all actions of a certain kind, and that without diſtinction, whether there has been a

probabilis cauſa litigandi or not. Where the decree is the act of the judge himſelf, this court will not award execution of it, if it ſhall appear to be unjuſt. But, in the preſent caſe, there is no room to inquire, whether the decree is juſt or not, and, to award execution of it, is in effect to give force to the ſtatute *extra territorium*. Suppoſe Thomas Clark had brought his action in the court of King's-bench *in forma pauperis*, and that court had ordered him to be corporally puniſhed, either by impriſonment or otherwiſe, it will not be maintained that this court would have enforced ſuch decree. *Vide* Principles of Equity, p. 228. *in fine*; and yet there ſeems no difference, as to the principle, between ſuch caſe and the preſent.

Anſwered for Laycock: The deciſion of the ſupreme court in one country is entitled to credit and authority with the ſupreme court of another country, unleſs it ſhall be proved to be unjuſt by him who oppoſes the execution of it. And it ought not to weaken the authority of the foreign decree, that it was agreeable to the ſtatutary law of that country, but the contrary. Whatever might have been the caſe, had the court of King's-bench ordered a corporal puniſhment to be inflicted upon Clark, no argument can be drawn from that to the preſent, where the queſtion is only of coſts, which cannot poſſibly be regarded as a penalty.

2*dly*, Clark ought not to be heard to object againſt this decree, becauſe he himſelf was the provoker, and muſt be ſuppoſed to have ſubmitted himſelf to the law of that country where he brought his action.

3*dly*, He might have obtained redreſs in England, had he thought the decree unjuſt; he might have had a new trial; he might have brought the cauſe before the twelve judges by a bill of exceptions; or, he might have appealed to the houſe of Lords.

'The Lord Kennet Ordinary repelled the defences pleaded for Clark,
'and decerned againſt him for the coſts awarded by the decree of
'the court of King's-bench.'

Upon a reclaiming petition and anſwers, the Lords adhered.

A. R.

Act. *J. Dalrymple.* Alt. *Lockhart.*

No LXVII.

No. LXVII. *July.* 1767.

LORD ELIBANK, and others,

Againſt

Mr WILLIAM BAILLIE Advocate, and others.

1. *Title to purſue.* 2. *Effect of a declarator of irritancy.*

THE purſuers having right to a leaſe of the concert-hall in the Canongate, Edinburgh, and to the ſcenery, wardrobe, and furniture belonging to it, by contract 'aſſigned and transferred' theſe ſubjects to David Beatt and John Dawſon for L. 1000, whereof L. 200 was paid in hand, the remaining L. 800 was to be paid in ſums of L. 200 at different periods; and the contract contained this proviſion. 'That, if any 'of the ſaid termly payments ſhall run into another unpaid, that then 'the foreſaid aſſignation of the ſaid leaſe, and others foreſaid, ſhall be 'void, and the ſame, and whole benefit thereof, ſhall revert and re-'turn to the ſaid Patrick Lord Elibank, and others foreſaid, and their 'foreſaids, to whom the ſame is in that caſe hereby conveyed, and who 'are hereby declared then to have full power, *brevi manu*, without any 'proceſs of law, to diſpoſe of the premiſes of new, equally, and in the 'ſame manner as if theſe preſents had never been entered into by the 'ſaids parties: It being however hereby underſtood, that it ſhall be op-'tional to the ſaid Patrick Lord Elibank, and others foreſaid, to take 'the benefit of the ſaid irritancy and conveyance, or tack, and to pur-'ſue for the payments due, or that may fall due, in conſequence of theſe 'preſents, as they may ſee proper.' The aſſignees became likewiſe bound not to remove the cloaths, &c. without conſent of the purſuers, and to ſhow them annually to the purſuers ſafe and in good condition.

Upon the 24th January 1767, when Beatt and Dawſon were in poſſeſſion in virtue of the contract, a riot having happened in the concert-hall, and conſiderable damage having been done to the ſcenery and furniture, the purſuers, with concourſe of the procurator-fiſcal, preferred a complaint to the ſheriff, charging the defenders with acceſſion to this riot, and concluding for damages, and a fine to the public.

The ſheriff having ſuſtained the title of the purſuers, the defenders preferred a bill of advocation to the Lord Auchinleck Ordinary, who pronounced this interlocutor: 'Having conſidered this bill, with the contract between 'the proprietors of the concert-hall and Beatt and Dawſon, from which 'it appears, that the ſaid proprietors, when making over the ſubjects to 'Beatt and Dawſon, reſerved to themſelves a right of ſecurity on the 'ſubjects, which gives them a right to inſiſt, that the ſubjects ſhall not 'be deſtroyed, and, if deſtroyed, ſhall be replaced; finds the proceed-'ings of the ſheriff produced, with the bill, agreeable to law; and there-'fore refuſes the bill.'

Another

Another bill having been preſented to Lord Barjarg, it was by him reported to the court.

Pleaded for the purſuers: That they had a right to inſiſt in this action as proprietors of the ſubjects; for, 1*ſt*, The aſſignment to Beatt and Dawſon was made under a ſuſpenſive condition, viz. that the price ſhould be paid at certain terms; and this condition not having been fulfilled, the property ſtill remained with the purſuers. 2*dly*, Suppoſing the property to have been transferred, it had returned to the purſuers, in conſequence of the irritancy, which, by the contract, was to take place *ipſo jure*, and therefore required no declarator, and, being conventional, was not purgeable. 3*dly*, If the purſuers were not proprietors, they had at leaſt reſerved a right of ſecurity over the ſubjects. To entitle a perſon to inſiſt in ſuch an action as the preſent, it is not neceſſary he ſhould have the property of the ſubjects deſtroyed. It is ſufficient that he has ſuch an intereſt in them, that he is in danger of ſuffering a patrimonial loſs by the deſtruction of them. Many authorities from the civil law might be quoted to this purpoſe. *V. L.* 17. *L.* 30. §. 1. *ff. ad l. Aquil.* where it is expreſsly laid down, that the *actio ex L. Aquilia*, was competent to a *bona fide poſſeſſor*, and to a *creditor pignoratitius*, and in the firſt caſe even againſt the true proprietor. From the ſeveral clauſes of the contract above recited it ſeems clear, that the purſuers had at leaſt a right of hypothec, a real ſecurity over the ſubjects deſtroyed, which they apprehend entitled them to inſiſt that they ſhould not be deſtroyed, or, if deſtroyed, replaced, or the damage done to them repaired.

Anſwered for the defenders: To the *firſt*, The property of the ſubjects was transferred to Beatt and Dawſon. If it had not, the irritant clauſe would have been unneceſſary.

To the 2*d*, It is a miſtake that the clauſe importing an *ipſo facto* voidance of the deed, could have any other effect than to make it *voidable*. The irritancy is clearly of a penal nature, and it is an undoubted rule in law, that penal irritancies, whether legal or conventional, cannot take effect without being declared, and that they may be defeated by an offer of payment any time before the decree is extracted, even where the irritancies are ſtipulated to take place *ipſo facto*, V. Stair's inſtit. B. 4. T. 18. §. 3. Dict. v. Irrit. And ſo it was found lately, Lord Rothes *contra* Shepherd, where it was expreſsly provided, by the tack, that it ſhould become *ipſo facto* void, if a ſecond term's rent ſhould fall due, while the firſt ſhould be unpaid.

Beſides, a declarator was neceſſary in this caſe, that it might appear how accounts ſtood between the purſuers and the aſſignees, and whether the purſuers were to make choice of the alternative, of taking hold of the irritancy.

To the 3*d*, No right, except that of property, or at leaſt, ſuch as produces a real action, affords a title to proſecute ſuch actions as the preſent. The action here inſiſted on, is preciſely the ſame with that founded upon the third head of the *L. Aquilia*, which, by the words of that law, was only given to the proprietor. This was indeed extended to a *bona fide poſſeſſor*, and *creditor ex pignore*; but their caſe was extremely different from that of the proſecutors. A *bona fide poſſeſſor* was in all reſpects conſidered as proprietor, and had an *utilis rei vindicatio*. A creditor

ditor *ex pignore* had the *actio quaſi ſerviana* which, with regard to him, had the ſame effect asa *rei vindicatio.* But there is no inſtance of this action being indulged to any who were not either proprietors, or had a real and actual hold of the goods damaged.

The connection between the purſuers and aſſignees, cannot be conſidered in a more favourable light than that between maſter and tenant. The maſter has an hypothec over his tenants effects to a certain extent, and, if he has actually ſecured them in virtue of the hypothec, may have a good title to ſue for damage done to them. But the caſe is different, where the maſter has only an option to attach. He has not then eſtabliſhed any connection with the goods; they are not in his poſſeſſion, nor at his riſque. This principle is remarkably illuſtrated by a deciſion in the caſe of a ſpuilzie of ſteelbow goods, which, it was found, might be proſecuted by the tenant only; Dict. *ſpuilzie* p. 389.

But the purſuers had not even a right of hypothec over the goods ſaid to have been damaged, in this caſe; no ſuch right is expreſsly reſerved by the contract, nor is it neceſſarily implied in any of the clauſes of it. Indeed though it had been expreſſed, it would not have been effectual, it being an eſtabliſhed principle in our law, *Quod mobilia non habent ſequelam.*

Many inconveniences might follow from allowing ſuch actions as the preſent to be brought at the inſtance of thoſe, whoſe intereſt in the goods is only remote or conſequential. If, on the one hand, an abſolvitor in ſuch action ſhould afford to the defenders a *res judicata* againſt all the world, occaſion might be given to colluſive proſecutions, to the prejudice of the perſon who has the direct intereſt. If, on the other hand, ſuch abſolvitor ſhould not afford a *res judicata*, a handle might be given for oppreſſion, by haraſſing the defender with endleſs law-ſuits.

'The Lords remitted the cauſe to the ſheriff, with this inſtruction, 'That he ſhould ſuſtain the objection to the purſuers title.'

The purſuers having, in the mean time, obtained a decree of declarator of irritancy againſt Beatt and Dawſon, preferred a reclaiming petition, wherein they contended, that as, by this decree, it was found, that the irritancy had taken effect, and that of courſe the property had returned to the purſuers, ſo there could not now be any objection to their title.

Anſwered for the defenders: As the effect of this irritancy was only to make the deed *voidable*, as was virtually found by the former interlocutor; ſo the irritancy can only be underſtood to take place from the date of the decree, or, at leaſt, from that of the ſummons of declarator, which was poſterior both to the riot and the commencement of this proceſs. There are indeed ſome decrees of declarator, as declarators of property, aſtriction, immunity, and others, which, from their nature, have a retroſpect, becauſe they confer no new right, but only confirm one which was formerly debatable. But, in declarators of irritancy, and many others, the caſe is different. There it is the decree of the judge that transfers the property to the purſuer, and voids the right formerly veſted in the defender; V. Bankton, B. 4. Sect 6. §. 32.; Erſkine B. 4. Tit. 1. §. 26. Dict. v. Irritancy. Hence it follows, that, notwithſtanding this decree, the property of the ſubjects at the time of the alledged riot,

was in Beatt and Dawſon, and they only could proſecute for damages done to them.

But, though this decree were ſuppoſed to have a retroſpect, it cannot be founded on as a title for carrying on an action commenced many months before the decree was obtained. A perſon's title to carry on an action ought to be produced *in initio litis*; and, if it is not, the action ought to be diſmiſſed. It is not ſufficient that the purſuer acquire a title during the dependence of the proceſs, except only in the caſe of heirs and executors. In all other caſes, it is of no avail; V. Dict. *voce* Title to purſue.

'The court, chiefly moved by the decree of declarator of irritancy, 'altered, and refuſed the bill.'

A. R.

Act. Coſmo Gordon. Patrick Murray. *Alt. Blair.* *Il. Campbell. Wight, et alii.*

No. LXVIII. *July* 31. 1767.

Colonel JOHN BLACKWOOD, *and others,*

Againſt

JOHN HAMILTON *and others.*

When the diviſion ought to take place in a judicial ſale of a bankrupt's eſtate?

1683. RICHARD, Lord Maitland, granted an heritable bond over his lands of Dudhope to Mr Robert Miln of Barnton, by whom it was conveyed to Sir George Hamilton of Tullyallan. Sir George again conveyed it to Sir John Halyburton and others his creditors, who were infeft upon it in 1709. Sir George likewiſe conveyed it to Sir Archibald Flemyng of Farm, who was infeft 1706; but the ſeiſine remained in the regiſter-office many years unknown. Blackwood of Pittreavie being creditor to Sir Archibald Flemyng, *inter alia*, adjudged from him this heritable bond.

Lord Maitland having been debtor alſo to John Pate and William Paton, they ſeverally adjudged the lands of Dudhope in 1690.

In 1735, a proceſs of ranking and ſale of Lord Maitland's eſtate was brought in name of Janet Hepburn, one of two heirs-portioners of John Pate; and, in 1741, a decree of ranking was pronounced, preferring the repreſentatives of the creditors-diſponees of Sir George Hamilton, who were infeft in 1709 *primo loco*, and Janet Hepburn and Thomas Paton, the repreſentative of William Paton the other adjudger, *ſecundo loco*, *et pari paſſu*; and finding, that as the ſums due to the creditors-diſponees of Sir George Hamilton would more than exhauſt the ſums in the heritable bond and infeftment, there was no place for ranking Mr Blackwood.

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This decree was extracted, and the eſtate ſold in 1744, at a price which fell ſhort of the ſums due upon the heritable bond.

Sir Archibald Flemyng's ſeiſin having been afterwards diſcovered, while great part of the price remained in the hands of the purchaſer, Mr Blackwood brought a reduction of the ranking and ſale, upon two grounds: 1*mo*, That Janet Hepburn the nominal purſuer was dead before the commencement of that proceſs; and therefore the whole proceedings were void. 2*do*, That the diſponees of Sir George Hamilton were preferred upon the ſuppoſition, that their infeftment in 1709 was the firſt; whereas it now appeared, that Sir Archibald Flemyng was infeft before; and, therefore, that Pittreavie ought at leaſt to prevail in the reduction, ſo far as to obtain his proper place in the ranking.

The Lords ſuſtained the reaſons of reduction, ſo far as to admit Mr Blackwood to his proper place in the ranking; but found that the proceſs having been raiſed in the name of a perſon that was dead, did not affect the decree of ſale.

A remit having been made to an accomptant to make out a ſcheme of diviſion, a queſtion occurred, whether the diviſion ought to take place, as at Whitſunday 1744, the term of the purchaſer's entry to the lands, or as at the time the account was made out? If the firſt, then the price was exhauſted by the ſums due upon the heritable bond, owing to the accumulation of a great number of paſt years intereſt. If the laſt, then, after payment of the principal ſums and intereſts due upon the heritable bond, there remained about L. 20000 Scots for the payment of the poſtponed creditors, the repreſentatives of Pate and Paton the adjudgers.

This queſtion having been taken to report by the Lord Pitfour Ordinary, it was *pleaded* for the poſtponed creditors, That as, in general, it is equitable, that creditors ſhould receive a rateable proportion of their debtor's effects, where theſe are inſufficient for payment of his whole debts; ſo here the creditors under the heritable bond ought not to be allowed to ſweep away the whole price by their accumulations, while the poſtponed creditors do not get payment of any part of their principal ſums, unleſs there be ſome poſitive law, or fixed principle of law, to the contrary. It has indeed been cuſtomary, where the proceedings have been regular, to make the diviſion take place at the term when the price becomes payable by the purchaſer; but there does not appear any law for this; and therefore that rule ought not to be extended further than the practice has already gone, and eſpecially to caſes, where, as in the preſent, the whole proceedings have been irregular. The regulations 1695 require, that there ſhould be an extracted decree of ranking before the ſale; but here the proceedings having been null, there was ſtrictly no decree of ranking. The ranking was not finally ſettled till the iſſue of Mr Blackwood's reduction. It ſeems therefore more agreeable to the ſpirit of theſe regulations, that no effect ſhould be given to the ſale; and, though the poſtponed creditors are willing that the ſale may be good to the purchaſers, yet they are entitled to plead, that it ſhall not have the effect to regulate the diviſion of the price. Neither ought it to have any weight that the court has found the irregularity of the proceedings did affect to the decree of ſale; for theſe proceedings being, in ſtrict law, undoubtedly null, this

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was only *ex nobili officio*, which neither is in practice, nor ought to be exerciſed to the prejudice of third parties.

Anſwered for the creditors ranked upon the heritable bond: It is allowed to be the practice to make the diviſion take place at the time the price becomes payable by the purchaſer. It is a miſtake that there is no law for this: It is founded in the cleareſt principles, and indeed in the nature of the thing. The ſcheme of diviſion, at whatever time it is made, is no more than the application of the rules eſtabliſhed by the decreet of ranking. The purchaſer immediately upon the ſale becomes debtor to the creditors for their proportion of the price. The debts, therefore, are accumulated at that period, for this reaſon, that the annualrents of the price muſt belong to the ſame perſon who has a right to the price itſelf. It is upon this principle that a debt is accumulated by a decree of adjudication, the creditor thereby coming to have a right and intereſt in the ſubject adjudged to the amount of his debt. For the ſame reaſon, if a debt bearing intereſt be aſſigned in ſecurity of another not bearing intereſt, the laſt will bear intereſt againſt the cedent from the date of the aſſignation; 25th January 1699, Inglis *contra* M'Morran. In this view, it is of no conſequence whether the ranking ſhall be ſuppoſed to have been before or after the ſale; for, even on the laſt ſuppoſition, the ſcheme of diviſion would, upon the above principle, be made out as at the date of the ſale, and the debts accumulated from that period; as was found in the caſe of a judicial ſale by an apparent heir; Drummond *contra* Angus, 1754.

As to the argument from the ſuppoſed nullity of the decree of ranking, it is *anſwered*, That, whatever challenge might have lain againſt that decree, ſuch challenge was not competent to the poſtponed creditors. The heritable bond was undoubtedly preferable; and, as that was more than ſufficient to exhauſt the price at the time of the decree, the poſtponed creditors had no intereſt; and therefore, by the regulations 1695, could not have been heard to challenge it. The after queſtion with Pittreavie was only among the creditors of Sir George Hamilton claiming under the heritable bond, with which the poſtponed creditors of Lord Maitland had no concern. Thoſe having intereſt in the heritable bond might, notwithſtanding any diſpute among themſelves, have applied the whole price immediately, and then there could not have been place for the preſent queſtion. In a word, the caſe falls to be viewed in the ſame light, as if, after the ſale, the intereſt of any of the creditors had been affected by diligence in the hands of the purchaſer, which it is clear could not have brought any advantage to the poſtponed creditors.

It might likewiſe be obſerved, that there is an inconſiſtency in the plea of the poſtponed creditors. At the ſame time that they allow the decree to be good to the effect of creating the fund, which is the ſubject of diſpute, they maintain that it is null, in order to appropriate that fund to themſelves.

'The Lords found, that the creditors in the right of the heritable 'bond ought to be ranked in the ſcheme of diviſion, *primo loco*, 'upon the price of the lands for the principal ſum and annualrents 'thereof due at Whitſunday 1744, the term of the purchaſer's 'entry, accumulated at that term into a principal ſum.'

A. R.

For the creditors in right of the heritable bond, *M'Queen. et Advocatus.* Alt. *Dav. Dalrymple*, ſen.

No. LXIX. *December*, 15. 1767.

ANDREW WAUCHOPE of Niddery,

Againſt

ARCHIBALD HOPE.

The act 1555, *with regard to warnings, does not apply to coal-works.*

MR HOPE having acquired right to a tack of the coal of Niddery, which expired at Martinmas 1767, Mr Wauchope, in ſpring that year, executed a warning againſt him, and brought a proceſs of removing; but the warning having been informal, Mr Hope was aſſoilzied. Mr Wauchope having brought another proceſs of removing in October, not founded upon the warning, 'the ſheriff ſuſtained the defence pled for 'Mr Hope, of the purſuer's having neglected to take the proper ſteps for 'getting him removed either in terms of the act of parliament or act of 'ſederunt, and aſſoilzied.'

Mr Wauchope preſented a bill of advocation, which, with the anſwers, was taken to report by the Lord Ordinary.

Pleaded for the purſuer: That the act 1555 only applies to rural ſubjects. Prior to the act, removings from lands were very ſummary; the proprietor broke a wooden ſpear before the tenant's door, and told him he was to remove. This might have been done upon the term-day, and followed by a *brevi manu* ejection, which muſt often have brought great diſtreſs and inconvenience to tenants of lands. It was to obviate this that the ſtatute was enacted. Hence, the ſtatute has been conſidered by all the writers on our law as reſpecting rural ſubjects only; Craig, *l.* 2. *D.* 9. § 18.; M'Kenzie's obſervations; Stair, *l.* 2. 1. 9. § 39. and 42.; and Lord Bankton, *v.* 2. *p.* 110. It is alſo upon this conſtruction of the ſtatute that it has been found not to apply to removings from towers and fortalices; Lady Salton *contra* Livingſton, quoted by Lord Stair, from ſoap-works; November 21. 1671, Riddel *contra* Zinzan, from houſes in the country; 11th March 1756, D. of Queenſberry *contra* Telfer; 19th December 1750, Lunden *contra* Hamilton; and there is

one caſe mentioned by Lord Stair, *b.* 2. *tit.* 9. § 38. where it was found not to apply to a coal-work; Laird of Woolmot *contra* Niddery. Indeed there ſeems leſs reaſon for extending it to coal-works than any of the other caſes. Tenants of houſes may be put to very great inconveniencies by being removed or ejected without a warning. In ſoap-works, the tenant may have quantities of ſoap and materials on hand, with a ſtore of caſks, and other utenſils, ſo that it may be a very great hardſhip upon him to be removed, when unprovided of a place whither he may tranſport theſe, and have them ſafely lodged. But, in a coal-work, not only the machinery, but even the perſons who work at the coal, belong to the proprietor of the coal; ſo that the tackſman has nothing to remove. He has only to deſiſt from working the coal.

Anſwered for Mr Hope: The ſtatute is quite general, and requires warning, according to the forms therein preſcribed, againſt the tenants of *all poſſeſſions whatſomever*. As there can be no doubt that coal-works are comprehended under the words, ſo they ſeem likewiſe to fall under the meaning of the ſtatute. The purpoſe of requiring theſe formalities in warnings, was to prevent the inconveniencies to tackſmen of every kind by being obliged to quit precipitantly the ſubjects of their ſeveral tacks. The tackſmen of coal-works, beſides the bound coalliers, muſt have a number of other ſervants, and houſes for their ſervants, as is the caſe with the defender. The inconveniencies meant to be obviated by the ſtatute, therefore, muſt affect the tackſmen of coal-works as much as the leſſees of any ſubject whatever.

The purſuer alledges the ſtatute ought to be confined to *rural ſubjects*. If by theſe is meant ſubjects connected with land which require the labour and induſtry of men to be beſtowed upon them, and produce a ſucceſſion of *fructus naturales*, a coal-work muſt be allowed to be a *rural ſubject* as much as any. If by a rural ſubject is meant what is called *a farm*, this is directly in the face of the ſtatute, which expreſsly mentions mills and fiſhings. In any view, a coal-work is as much a rural ſubject as any of theſe.

The defender's conſtruction of the ſtatute is confirmed by the univerſal ſenſe of the country. It will not be denied that it is the invariable practice to uſe warnings in the form preſcribed by the ſtatute againſt the tackſmen of coal.

None of the deciſions quoted for the purſuer are ſtrictly analogous to the preſent, except that of Woolmet *contra* Niddery, which appears to have proceeded upon a wrong *ratio decidendi*. Hope, by whom it is collected, ſays, 'It was ſo found, becauſe, in coal-works, no terms are 'conſidered, but the fruits are reaped daily.' This would apply equally to the caſe of mills; as to which, however, there is no doubt that a warning is neceſſary. It is ſubmitted, therefore, whether the authority of this ſingle deciſion ought to have more weight than the words of the ſtatute, and the ſenſe of the country with regard to its meaning, appearing from the univerſal practice.

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The court were of opinion, that the ſtatute did not take place in removings from coal-works, and that no more was neceſſary than to give timely notice, which had been done in this caſe.

'They remitted to the ſheriff to decern in the removing.'

A. R.

No. LXX. *December* 19. 1767.

Captain JAMES STEWART,

Againſt

ALEXANDER ROBERTSON Writer to the Signet.

In reviewing the judgment of freeholders, the court of ſeſſion cannot receive evidence which was not produced to the freeholders.

AT Michaelmas head-court 1767, Captain James Stewart claimed to be enrolled as a freeholder in the county of Forfar, upon the lands of Nevay; and he produced a certificate from two commiſſioners of ſupply of that county, bearing, that theſe lands ſtood valued in the ceſs-books at L. 800 Scots.

It was *objected* by Mr Robertſon, 'That the certificate produced does 'not inſtruct the valued rent of the lands claimed upon; that certificate 'is only evidence, that the lands which belonged to the Laird of Nevay, 'in the pariſh of Nevay, are valued in the roll 1683 at L. 800 Scots; 'but there is no evidence produced to the freeholders, that theſe are the 'lands claimed upon.'

It was *anſwered* for the claimant: That the certificate and old ceſs-books produced inſtructed, that the lands claimed on were the lands which formerly belonged to the Laird of Nevay; and it was ſaid, that the fact was notoriouſly known in the country.

The freeholders refuſed to enroll Captain Stewart, who complained to the court of ſeſſion; and, along with his petition and complaint, he produced a connected progreſs, which proved, that the lands he claimed upon were thoſe which had formerly belonged to the Laird of Nevay, and ſtood in the valuation-roll and ceſs-books at L. 800 Scots.

It was *anſwered*, in ſupport of the objection, That Captain Stewart had not produced to the freeholders ſufficient to ſatisfy any court, that the lands to which he had right were the lands entitled to the valuation he claimed; and that, although he produced to the court of ſeſſion ſufficient evidence to inſtruct that fact, it could not be received; as the only queſtion under the conſideration of the court was, whether the freeholders did right or wrong in refuſing to ſuſtain the complainer's claim upon the evidence before them? That, if the freeholders had jud-

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ged properly upon the evidence produced to them, their judgment could not be overturned in consequence of any new or additional proof, which had never been under their consideration; and therefore the writings produced along with Captain Stewart's complaint could not be received.

'The Lords, having heard this petition and complaint, with the answers thereto, and writs produced, find, That the freeholders did right in refusing to inroll the petitioner at last Michaelmas; and therefore dismiss this complaint,' &c.

Captain Stewart gave in a very full petition against this interlocutor, which was refused without answers.

A. E.

For Captain Stewart, *M'Queen, Ilay Campbell*, &c.
For Mr Robertson, *Lockhart, Rae, Alex. Elphinston*, &c.

No. LXXI. *December* 24. 1767.

WILLIAM PULTNEY, and others,

Against

Sir JOHN GORDON, and others, Commissioners of Supply for the County of Cromarty.

Any private commissioner of supply may call a meeting of the commissioners where there is no conveener.

AT a general meeting of the commissioners of supply for the county of Cromarty, 30th April 1765, they chose Sir John Gordon conveener.

At a meeting upon the 20th June, in consequence of an adjournment, the commissioners elected Charles Urquhart of Braelangwell conveener, and adjourned to the 8th of October.

Sir John Gordon having obtained suspension of the proceedings at this meeting, and particularly of the nomination of Mr Urquhart as conveener, called a meeting upon the 12th September, when the valuations of certain lands in the county were divided.

Mr Pultney brought a reduction of these divisions, upon this ground, among others, that they were made at a private meeting, not called by any authority, Sir John Gordon, at whose desire the commissioners were assembled, having been divested of the office of conveener.

Sir John Gordon *answered: 1st*, That the commissioners could not arbitrarily supersede him; and, *2dly*, That the suspension of the nomination of Braelangwell had the effect to reinstate him in the office.

'The

The Lord Ordinary having taken the cauſe to report, the court were unanimouſly of opinion, that the commiſſioners might remove their conveener at pleaſure. 2*dly*, That Sir John was not reinſtated by the ſuſpenſion; but repelled the reaſons of reduction, upon a ground which had not been in the view of the parties, viz. that where there is no conveener, any private commiſſioner may call a meeting.

Mr Pultney, in a reclaiming petition, *contended*, That a meeting could not in any caſe be called by a private commiſſioner upon the following topics: 1*ſt*, From the tenor of the whole ſupply-acts, from firſt to laſt, it is evident, that the legiſlature never underſtood, that the commiſſioners had the power of aſſembling themſelves. Originally, conveeners were expreſsly named in the act; afterwards a certain day was appointed for their firſt meeting, which day the ſheriff was to intimate to them; and, after the firſt meeting, they were empowered to adjourn themſelves, and chuſe their own conveener, who might likewiſe aſſemble them occaſionally. 2*dly*, This has alſo been the ſenſe of the country. Except in one or other of thoſe ways, it has hitherto been underſtood, that the commiſſioners could not be aſſembled; and there is not one inſtance of their aſſembling themſelves, or of a meeting being called by a private commiſſioner. The deciſions of the court have alſo proceeded upon the ſuppoſition, that no ſuch thing could be done. In the Dictionary, *voce* Commiſſioners of Supply, is a caſe reported in theſe words: 'In a competition, which of two perſons was duly elected col-'lector of the land-tax for the ſhire of Caithneſs, it was found, that, 'after elapſing of the day appointed by act of parliament, the ſheriff 'of the ſhire was the proper perſon to appoint another diet for the 'commiſſioners of ſupply their firſt meeting; 3d July 1729, Sinclair '*contra* Sinclair.' In that caſe there could have been no difficulty, if a meeting might have been called by any private commiſſioner; but the court ſeems to have been of a different opinion, and that it was neceſſary they ſhould be aſſembled for the firſt meeting by the ſheriff. 3*dly*, Giving ſuch power to private commiſſioners would be highly inexpedient; it might introduce great confuſion into the buſineſs of the county; one commiſſioner might call a meeting to-day, another to-morrow; and, as there is no fixed rule with regard to the notification, their intimations might be contrived in ſuch a manner, as to reach only their particular friends, ſo that one ſet of commiſſioners might be conſtantly undoing what another had done, and preſcribing rules, with reſpect to the buſineſs of the county, diametrically oppoſite and contradictory to each other. In the diviſion of valuation, in particular, ſuch a practice might be attended with the moſt unjuſt and oppreſſive conſequences. It is for this reaſon the court has repeatedly found, that no diviſion of valuation ſhould be held good, unleſs made either at a general meeting upon the day mentioned in the act, or at an adjournment from that meeting, or at a meeting ſummoned by the conveener.

It was added, that there appeared no room for the plea of neceſſity. In the above mentioned caſe, it was found, that the ſheriff might ſtill appoint the firſt meeting after the day aſſigned by the act of parliament was elapſed. There ſeems the ſame reaſon why he ſhould interpoſe his authority to after meetings, where there is no adjournment or conveen-

er. At any rate, there can be no doubt that an application to this court would in all cases be effectual. In the present case, the meeting stood only adjourned to the 8th of October.

'The Lords refused the petition, without answers.'

A. R.

Act. *Ilay Campbell, Mc Queen, et alii.* Alt. *Blair, et alii.*

No. LXXII. *January* 2. 1768.

WILLIAM DOUGLAS of Bridgetown,

Against

Captain ALEXANDER REID of Logie.

Evidence necessary to be produced by a claimant to a court of freeholders.

AT the Michaelmas head-court for the county of Forfar, in October 1767, a claim was presented for Captain Reid, for being inrolled in the roll of freeholders for said county; and the claim narrated the different titles founded on by the claimant, and, among others, the general retour of Thomas Stormont of Kinclune.

When the claim and claimant's title-deeds came to be considered by the freeholders, the above mentioned retour was amissing; upon which it was *objected*, That the claimant could not be enrolled, in regard that Thomas Stormont's retour not being produced, which was a necessary part of the claimant's progress, there was no proper evidence before the freeholders to show that the claimant had right to the lands of Kinclune, part of the lands upon which he claimed.

Answered for Captain Reid: That not being able to be present at the meeting of the freeholders, he had lodged the whole title-deeds, and, among others, the retour now mentioned, in the hands of the sheriff-clerk of the county, who was the notary that took his infeftment on the lands of Kinclune, with orders to lay his claim and titles before the meeting of freeholders. And the sheriff-clerk, who had been elected clerk to the freeholders meeting, acknowledged, in presence of the freeholders, that the retour was lodged with him, and that he had it in his hand the morning of that meeting, and imagined he had brought it into court with him, although he could not then find it.

The majority of the freeholders were of opinion, that the objection ought to be repelled; and Captain Reid was accordingly added to the roll.

Mr

Mr Douglas complained of this judgement of the freeholders, to the court of ſeſſion, and *pleaded*, That, by the ſtatute of the 16th of George II. it was expreſsly required that every claimant ſhould produce the titles and vouchers of his qualification to the freeholders; and, as in the preſent caſe, Captain Reid had not produced the retour he founded on, which was a moſt material part of his title-deeds, as, without it, he could not connect his ſeiſine with the precept on which it proceeded, the charter and precept of ſeiſine, on which the claimant was infeft, not being conceived in favours of the claimant's author Thomas Stormont, but in favour of his father Alexander Stormont, ſo that Thomas Stormont could not have taken infeftment, in virtue of the precept contained in that charter, without making up his titles by a ſervice; and as he could not have taken infeftment, ſo neither could he convey or aſſign that precept to another, for the purpoſe of his being infeft. The retour therefore was a neceſſary mid-couple for connecting the claimant's ſeiſine with the precept on which it proceeded, as without it the ſeiſine would have proceeded without a warrant, and the retour not being produced, Captain Reid the claimant could not be conſidered as having any title to theſe lands.

Anſwered for Captain Reid: That he lodged his whole title deeds with the ſheriff clerk of the county, to be produced to the freeholders, not being able to be preſent himſelf, all of which were accordingly produced to the freeholders, this retour excepted, which the ſheriff-clerk acknowledged he had in his cuſtody the morning of the meeting; that this retour not being produced, could not be fatal to his claim, as it was no more than a link in the title, to give right to the precept of ſeiſine contained in the charter; that, in the preſent caſe, the diſpoſition from Thomas Stormont, in favours of the claimant, proceeds upon a recital of the retour in queſtion, and mentions, that it was delivered to the claimant; and which diſpoſition, with the charter and ſeiſine, in which laſt the retour is likewiſe recited, being all produced to the freeholders, clearly inſtructed the claimant's right to the lands; and, as it was impoſſible the want of the retour could vary or alter the terms of the right, ſo its not being inſtantly to be found in the court of freeholders could be no ſolid objection to the claimant's inrollment, more eſpecially, as an extract of the retour from chancery is now produced in proceſs.

'The Lords ſuſtained the objection, that Thomas Stormont's retour, one 'of the title-deeds mentioned in the claim, and a neceſſary part of 'the reſpondent's progreſs, was not produced to the meeting of free-'holders; and find that the freeholders did wrong, in admitting 'Captain Alexander Reid upon the roll of freeholders, and ordain-'ed the ſheriff-clerk to expunge his name from ſaid roll.'

A E.

For *Douglas, John Swinton junior, and Andrew Croſbie, &c.* For *Captain Reid, Alex. Lockhart, and A. Elphinſton, &c.*

N. B. This judgement was reverſed upon an appeal.

No

No. LXXIII. *February* 6. 1768.

DAVID DICKSON of Kilbucho,

Againſt

The HERITORS of the pariſh of Newlands.

Juriſdiction of the court of ſeſſion, in judging upon the proceedings of eccleſiaſtical courts.

MR Dickſon had for many years been ſettled miniſter of the pariſh of Newlands; but, in April 1767, the preſbytery of Peebles, upon an action which had been brought before them, accuſing Mr Dickſon of ſundry irregularities, pronounced a ſentence, depoſing him from the office of the miniſtry; and the heritors of the pariſh having refuſed to pay Mr Dickſon his ſtipend, in regard of the abovementioned ſentence of depoſition, and that another miniſter had been preſented to the kirk by the patron, Mr Dickſon charged the heritors with horning, which charge they ſuſpended.

The queſtion came before Lord Stonefield as Ordinary, when it was *pleaded* for the charger, That the ſentence of depoſition, ſaid to be pronounced by the preſbytery was void and null, in terms of the act of parliament 1686, cap. 3. and ſundry acts of aſſembly, not having been ſigned by the moderator, or any of the members of the preſbytery; and farther, that the proceedings upon which the ſentence is ſaid to be founded, were ſo irregular and informal, that no faith whatever could be given to them, or effect to the decree pronounced upon them.

Anſwered for the ſuſpenders: The act of parliament 1686 relates only to civil, but not to eccleſiaſtical judicatories; that it was not the practice of church-judicatories to ſign their ſentences; and, as an extract of the ſentence of depoſition under the hand of the preſbytery-clerk had been produced, the ſuſpenders were not in ſafety to pay to the charger. And it was further *argued*, That it was not competent for the civil court to look into the proceedings of the eccleſiaſtical court, as an extract of the ſentence was produced.

The Lord Ordinary, before anſwer, allowed a proof as to the practice of the preſbytery of Peebles in ſigning their minutes and proceedings; and a proof being led, and reported, his Lordſhip ordered memorials to the court; upon adviſing of which, the following judgement was pronounced.

'On report of Lord Stonefield, and in reſpect there is no proper evi-
'dence produced of the charger Mr Dickſon's being depoſed, the
'Lords find the letters orderly proceeded, and decern.'

A. E.

For the Charger, *Al. Elphinſton*.. For the Suſpenders, *Al. Wight*. Clerk.

No LXXIV.

No. LXXIV. *February* 24. 1768.

WILLIAM WRIGHT, MARY GRAHAM, and JAMES TOWER Procurator-fiscal,

Againſt

KATHARINE TAYLOR.

Whether one impriſoned for a fine, damages, and expences, ex delicto, *is entitled to the act of grace?*

THE purſuers obtained a decreet againſt the defender for certain ſums as a fine, damages, and expences, on account of an aſſault upon the perſon of Mary Graham. The ſentence contained a warrant to impriſon till payment; in virtue of which the defender was committed to the priſon of Stirling, and having been denied the benefit of the act of grace by the magiſtrates, ſhe preferred a bill of advocation.

Pleaded for the defender: The benefit of the act is given to thoſe who are impriſoned for *civil debts*, but denied to priſoners for *criminal cauſes*. The defender's caſe falls under the rule, not the exception. By priſoners for criminal cauſes are meant thoſe who are committed for trial, or in *modum poenae*; neither of which is the caſe with the defender: She is impriſoned till payment of a liquid ſum, which, from whatever ſource it may have ariſen, falls now to be conſidered as a civil debt.

If the nature of the action were to be conſidered, that againſt the defender was civil, at leaſt ſo far as related to damages and expences. Criminal actions are defined in the civil law to be *quibus de ſeveritate publicae diſciplinae agitur*; civil ones, *quibus de rebus ad ſingulorum patrimonium pertinentibus diſceptatur*. The concluſion for damages and expences clearly falls under the latter deſcription. In the civil law, the actions competent in this caſe would have been *actio utilis de L. Aquilia*, or *civilis ex L. Cornelia de injuriis*; neither of which was properly criminal.

Anſwered for the purſuers: It is not probable the legiſlature had any eye to the ſubtile diſtinctions of lawyers in the diviſion of actions. The diſtinction meant was a great and ſolid one, founded in reaſon and ſound policy, viz. between debtors and delinquents, thoſe who from misfortune are unable to diſcharge the contractions incurred in the uſual and neceſſary affairs of life, and thoſe who, by their crimes, whether more or leſs atrocious, have ſubjected themſelves either to puniſhment or reparation. The words of the ſtatute import this diſtinction, and no other. Civil debts are thoſe which ariſe from contracts, or other tranſactions in *civil* life. Thoſe are priſoners for criminal cauſes, whoſe impriſonment is cauſed or occaſioned by their crimes. In this view, there is no difference between a fine and damages and expences. If they a-

riſe *ex delicto*, they alike fall under the exception, not the rule, of the ſtatute.

This is the conſtruction that has been invariably put upon the ſtatute, both by the writers on our law, and by the court; Bankton, *v.* 3. *p.* 18. 19. 20.; Erſkine, *b.* 4. *tit.* 3. § 28.; M'Leſly, 23d November 1738; Will *contra* Urquhart, 5th January 1754.

There is a great affinity between the privilege given by this act and that of a *ceſſio bonorum*, in which the ſame diſtinction obtains that is contended for by the purſuers; 15th July 1750, Walker; 3d November 1751, Malloch; *Voet*, *De ceſſione bonorum*, § 5.

'The Lords refuſed the bill.'

A. R.

For Taylor, *Alex. Murray.* Alt. *Rolland.*

No. LXXV. *March* 5. 1768.

JAMES GRIERSON,

Againſt

CAMPBELL, and others, his creditors.

Whether half-pay muſt be aſſigned to creditors in a ceſſio bonorum?

JAMES GRIERSON, a lieutenant in the navey, upon half-pay, having brought a proceſs of *ceſſio bonorum*, ſome of his creditors inſiſted that he ſhould ſurrender his half-pay.

Pleaded for the creditors: The benefit of the *ceſſio bonorum* is introduced into our law from the civil. The text of that law allowed of no exception from the ſurrender by the bankrupt; and the only exception admitted by the commentators is his wearing apparel. *Adeo autem* (ſays Voet) *bonis omnibus cedere debitorem oportet, ut jure quidem civili nihil omnino ſibi ſervet, praeter veſtem viliorem et quotidianam. De caetero non praeſentia tantum bona cedi neceſſe eſt, ſed et futura, ſi modo talia ſint quae jam ſpe acquiſivit*; Voet, De ceſſione, bon. § 7. He had indeed the *beneficium competentiae*; but this was only of any effects he might afterwards acquire. *Cedit debitor creditoribus* (ſays Struvius) *omnia ſua bona, ita ut ipſi nihil praeter veſtes quotidianas, ſub quibus et lectum comprehendunt, relinquatur: Ne quidem alimenta neceſſaria, quae tamen ipſi ex bonis poſtea quaeſitis conceduntur.*; Synt. jur. civ. ex. 44. § 30.

The ancient Scots law agrees with the civil in both reſpects. 'He 'who ſhould be made *hairman*, (*i. e.* liberated upon inſolvency) ſall 'ſwere in court that he has na gudes nor gear attour 5 ſhillings and an 'plack. He ſall not retene to himſell of all his wonning and profit, 'frae that day in anie time coming, but twa pennies for his meat and 'claith, and he ſall give ilk third penny for payment of his debt;' Stat. Will. cap. 17.

It

It does not appear that the ancient law has been altered; nor is any exception allowed by the writers on our law from the general diſpoſition by the bankrupt.

It is true, this ſum is not arreſtable; but it does not from thence follow, that it may not be aſſigned by the debtor. Sums due by bills of exchange, the future profits of land or money, are not arreſtable; yet there is no queſtion that the creditors are entitled to a conveyance of theſe.

At any rate, the purſuer ought to aſſign his half-pay, ſo far as it may exceed what is neceſſary for aliment. It was found, that, though an officer's ſubſiſtence money was not arreſtable, yet the arrears were; 26th January 1715, Captain Brodie. And, as a debtor muſt convey even certain ſums which are not arreſtable, *a fortiori*, he ought to convey all that may be affected by that diligence.

Anſwered for the purſuer: No argument can well be drawn from the Roman, or ancient Scots law, to the preſent caſe, the ſubject in queſtion having been unknown in the time of theſe laws. Beſides, it is certain, that, notwithſtanding the general terms in which the rule is laid down as to this matter; yet there were many exceptions. Thus a ſum might be given to a debtor with a *proviſo*, that it ſhould not be aſſignable by him, nor attachable by his creditors; and it would be no bar to his obtaining the *ceſſio* that this could not be conveyed by him. The purſuer's half-pay falls to be conſidered much in the ſame light with ſuch a ſum. It is given by government for decent living to him, and that he may be ready for the public ſervice when required. If it ſhould not be applied in this way, he would be in danger of loſing it. It is for this reaſon that it is not arreſtable. For the ſame reaſon, he ought not to be obliged to aſſign it; and indeed it was ſo found *in terminis* by the houſe of Lords in the caſe Alexander Blackwood *contra* John Cathcart. Nay, it is univerſally underſtood, that the pay of ſea-officers, eſpecially whether full or half-pay, is not *aſſignable*, in ſo much that no agent will pay upon an aſſignation.

This argument applies to the whole of the half-pay; and, as there is here no queſtion as to arrears, the caſe of Captain Brodie is no precedent.

'The Lords found the purſuer was not obliged to aſſign any part of 'his half-pay.'

A. R.

Act. *Buchan Hepburn.* Alt. *Geo. Ferguſon.*

LXXVI.

No LXXVI. *March* 10. 1768.

WILLIAM DOUGLAS of Bridgetoun, and WILLIAM MILN of Bonnitoun,

Againſt

ALEXANDER ELPHINSTON, advocate.

Res Judicata.

MR Elphinſton was inrolled in the roll of freeholders for the county of Forfar at Michaelmas 1767. Mr Douglas and Mr Miln complained to the court of ſeſſion, of the judgement of the freeholders, inrolling Mr Elphinſton, and ſtated ſundry objections to his qualification, and, among others, an objection to the diviſion of the valued rent of the lands upon which he claimed.

The court, upon adviſing the petition and complaint, anſwers &c. January 22. 1768, 'Suſtained the objection with reſpect to the 'diviſion of the valuation of the reſpondent's lands, and find, that 'the freeholders did wrong in admitting the reſpondent, Mr Alexander 'Elphinſton, to the roll of freeholders, for the county of Forfar, at 'Michaelmas laſt; and therefore grant warrant to, and ordain the 'ſheriff-clerk of the ſaid county to expunge his name from the ſaid 'roll, and decern; and find it unneceſſary to determine the other objec-'tions with reſpect to the validity of the reſpondent's rights.'

Againſt this judgement Mr Elphinſton took an appeal, and the cauſe coming to be heard in the houſe of peers, the above recited interlocutor was reverſed.

How ſoon the judgement of the houſe of peers was known in Scotland, Mr Douglas and Mr Miln gave in a petition to the court of ſeſſion, praying the court to reſume the conſideration of the other objections they had ſtated to Mr Elphinſton's qualification, which had not received the judgement of the court.

Anſwers were put in for Mr Elphinſton, in which it was *contended*, That as a judgement which exhauſted the whole cauſe had been pronounced by the court, when the queſtion was formerly under conſideration, and decreet had thereupon been extracted, the cauſe was out of court; ſo that there was now no depending proceſs; and therefore it was incompetent to reſume the conſideration of any of the other objections.

The court, March 10. 1768, pronounced this interlocutor: 'The 'Lords having heard this petition, with the anſwers thereto, and judge-'ment of the houſe of peers, they refuſe the deſire of this petition.'

Pleaded, in a reclaiming bill for Meſſ. Douglas and Miln, There may be many caſes where ſundry points occur, each of which is deciſive of the cauſe. A defender may have various defences, each of which are relevant

relevant to procure an abſolvitor, and it would be extremely hard, in caſes where the court give judgement upon one point only, and ſuperſeded determining the others as unneceſſary, if ſuch judgement ſhould be reverſed upon an appeal, that it ſhould not be in the power of the court to reſume the conſideration of the other points of the cauſe, and to determine the ſame in favours of the perſon with whom the merits did truly lie, merely becauſe the decreet had been extracted, which was abſolutely neceſſary for the purpoſe of diſcuſſing the appeal. The houſe of peers have no radical juriſdiction in queſtions ſuch as the preſent, but is only a court of review; and of conſequence cannot take cognizance of points which were not under the conſideration of the court of ſeſſion. The extracting of the decreet was not the voluntary act of the complainers; it became neceſſary in order to diſcuſs the appeal which was taken by the reſpondent before the reclaiming days were run, and when it was competent for the complainers to have reclaimed againſt that part of the interlocutor of this court, finding it unneceſſary to determine the other objections; and therefore the cauſe ought to proceed in this court, in order to have the other points determined, which had not yet received the judgement of the court.

Anſwered for Mr Elphinſton: There is no more ſolid or better founded defence in the law of this country, than that of a *res judicata.* When judgement is given in any cauſe, either condemning in, or abſolving from the concluſions of the libel, and decreet thereupon regularly extracted, that cauſe is thereby out of court, and can never afterwards be renewed upon the ſame grounds; ſuch after litigation being moſt juſtly and effectually barred by the objection of a *res judicata.*

In the preſent caſe, the ſingle purpoſe of the petitioners action was, to have the reſpondent expunged from the roll of freeholders; the court pronounced judgement exactly conform to the libel brought; that judgement was extracted by both parties, and thereby the cauſe and parties were entirely out of court; ſo that the queſtion comes to be, what is the effect of the judgement of the houſe of peers? That judgement is no more than a ſimple reverſal of the decree of this court, and can never bring back into court a cauſe, which, by the eſtabliſhed law of the country, and forms of court, was entirely at an end. Had the judgement of this court been affirmed upon the appeal, it could not have returned here, and ſo muſt have been an effectual judgement in favours of the petitioners; and the houſe of peers reverſing that judgement, ought to be as effectual to the reſpondent, as the affirming of it would have been to the petitioners. This court did not ſuperſede, but found it unneceſſary to determine the other points; the judgement given exhauſted the cauſe; the petitioners did not demand the judgement of the court upon the other objections, but reſted their plea ſolely upon the point determined. Had no appeal been taken, neither party could have applied to the court after extracting decreet; and the judgement upon that appeal, being a ſimple reverſal, cannot alter the caſe. Had the houſe of peers intended that any farther procedure ſhould be had in this court, they would have remitted the cauſe back, in order that the other points might be conſidered; but no ſuch remit being expreſſed

in the judgement of the houſe of peers, the cauſe muſt, in every view, be conſidered as at an end.

'The Lords refuſed the deſire of the petition and adhered.

For the Complainers, *Ro. M'Queen, And. Croſbie, &c.*
For the Reſpondent, *Rae, Wight, and P. Chalmers.*

No. LXXVII. *June* 29. 1768.

DUKE of ROXBURGH,

Againſt

EARLS of HOME and TANKERVILLE.

A fiſhing in the river Tweed, poſſeſſed jointly by a Scots and Engliſh heritor, how far ſubject to the regulations of the act 1696, c. 33. *and the cogniſance of the court of ſeſſion?*

THE Earl of Home has right to Fairburn's-mill on the north ſide of the Tweed, with the fiſhings thereof, in virtue of grants from the Kings of Scotland. The Earl of Tankerville is proprietor of the oppoſite lands and fiſhing in the river, by grants from the Kings of England. The river is there ſo rapid, that it is impoſſible to fiſh by net and coble. There had been immemorially a dyke running from the north ſide, conſiderably beyond the middle of the river towards the ſouth, which, beſides ſerving to convey the water to Fairburn's-mill, had been uſed by both Earls for the ſalmon-fiſhing. In this dike were five holes, three towards the north, and two towards the ſouth-ſide of the river. On the upper ſide of theſe holes were fixed pock-nets, on the other ſide ſquare barricades of ſtones, with openings in the ſides, and over theſe openings frame-nets, ſo placed as to allow the fiſh to go up the river, but to catch all that return. This dike had been immemorially kept in repair at the joint expence of both Earls, and the fiſh caught there equally divided.

The Duke of Roxburgh, proprietor of the ſuperior fiſhings at Kelſo and Mackerſton, brought an action againſt Lord Home and his tackſman, concluding, that the defenders ſhould be prohibited to uſe that mode of fiſhing in time to come, as contrary to the regulations eſtabliſhed by the act 1696, *c.* 33. and for the penalties in that ſtatute, &c.

The Earl of Tankerville ſiſted himſelf in the proceſs. And the queſtions debated were, What was the boundary of the two kingdoms at the place? Whether any part of the river was ſubject to the regulations of the act 1696? and, Whether the matter was cogniſable by the court of ſeſſion?

The

The purſuer maintained, That a line drawn along the middle of the river divided the two kingdoms; and all that part of the river which was on the north ſide of that line belonged to Scotland, and was ſubject to the laws and juriſdiction of the courts of Scotland. In ſupport of this propoſition, it was *argued*, That this was the law with reſpect to rivers which divide private property; and hence, theſe rules with regard to the diviſion of the channel, and the right of iſlands that may ariſe in ſuch rivers. And it does not appear, why the ſame ought not to be the caſe, with regard to rivers which divide independent kingdoms.

2*do*, This ſeems to have been the idea of the Scots legiſlature. It is true, that, in the act 1597, 2. § 5. 1600, 5. with regard to killing ſalmon, &c. the rivers Tweed and Annan were excepted; becauſe it was thought, that the obſervation of the regulations contained in theſe ſtatutes by the Scots would only have the effect to add to the value of the fiſhings on the Engliſh ſide. But, after the union of the crowns, an act paſſed 1606, 5. expreſsly extending all the former regulations to theſe two rivers, which evidently ſhowed, that the Scots parliament underſtood that part of theſe rivers belonged to, and was ſubject to the laws of Scotland. The rights of the defenders too proceed upon the ſame ſuppoſition; for, how came the kings of England and Scotland to grant fiſhings upon this river to their reſpective ſubjects, if part of it had not been underſtood to belong to each kingdom?

It was maintained on the part of the defenders, That the whole river was the proper boundary between the two kingdoms, and that no part of it belonged excluſively to either. It is true, by the civil law, the channel of a river is divided between the proprietors on either ſide; but it does not follow from thence, that, while the river exiſts, it is to be divided in the ſame manner. On the contrary, rivers were by that law held to be common to all the world, § 2. *Inſt. de ur. div.* Indeed, ſuch diviſion as is contended for by the purſuer would be often impracticable, and at all times the ſource of confuſion and animoſity, from the various windings and frequent changes in the courſe of the river.

But, ſuppoſe, *in dubiis*, the middle of the river were to be held the boundary, yet there is no doubt that a different rule may take place, either by expreſs covenant, or immemorial uſe or poſſeſſion; *Grotius de jure, B. et P. l.* 2. *c.* 3. § 18. The whole river may either belong to one ſtate, or may belong in common to both.

With regard to the Tweed, there is not, in all the records of antiquity, any trace of ſuch diviſion as is contended for by the purſuer, or of courts of either kingdom extending their juriſdiction juſt to the middle, and no farther. On the contrary, it appears from the border-laws, 1*ſt*, That the fiſhings in this part of the river were not conſidered as ſubject to the cogniſance of the courts of either kingdom, but were regulated in the way of treaty by commiſſioners veſted with the authority of both, or by the warden of the marches, a judge appointed by theſe commiſſioners. 2*dly*, That, in all queſtions regarding theſe fiſhings, the thing chiefly attended to was ancient uſe and poſſeſſion. Thus, by a treaty between Edward VI. of England and Mary of Scotland, it was covenanted

nanted and agreed, ‘ That ſo many and ſuch fiſhings in the flood of ‘ Tweed, from the bounds and limits of Berwick, aſcending up- ‘ wards to Rydingburne, even as many and ſuch ſhall apertain to the ‘ kingdome of Scotland, as notoriouſly did apertain thereunto before the ‘ beginning of the ſaid wars, and by the Scots were haunted, and by ‘ uſe exerciſed and holden of the ſame manner as by right they might;’ Nicolſon’s border-laws, p. 60. § 5. From another treaty, in 1553, it appears, that certain queſtions with regard to the right of fiſhing in this part of the river between Lord Home and Richard Bowes, and between Home of Manderſton and Selby of Tweedzzet, were determined by the commiſſioners upon a proof of the ancient poſſeſſion; and, by another ſection of the ſame treaty, it is ordered, ‘ That, if any of the ſubjects of ‘ both realms, unlawfully trouble, ſtop, or make impediment to the ſub- ‘ jects of the oppoſite realm, in his or their fiſhing in the water of ‘ *Tweed*, ſo that he may not thereby uſe and fiſh his fiſhing, according ‘ to the virtue of theſe *treives*, that it ſhall be lawful to the party grie- ‘ ved to give in his complaint to the warden of the marches where the ‘ offender is dwelling, which warden ſhall cauſe the ſaid offender to be ‘ attached *to the day of treives*.’

As this ſeems to have been the way in which all queſtions with regard to the fiſhings in this part of the river were determined, ſo no caſe could occur where the interpoſition, either of the legiſlature or courts of either kingdom could be ſo improper as the preſent. The Earls of Home and Tankerville having a joint right to this fiſhing *pro indiviſo*, no regulation could be inforced or decree pronounced againſt one which would not likewiſe affect the other. A decree againſt Lord Home muſt affect the intereſt of Lord Tankerville, though he is not a ſubject of Scotland, and holds his eſtate from the crown of England.

It is true, the old regulations with regard to the time of killing ſalmon, &c. were, by the act 1606, extended to the Tweed, and Annan. But, 1*ſt*, This might be meant of theſe rivers, ſo far only as they were within Scotland, but not where they were the boundary. 2*dly*, Thoſe old regulations were only prohibitions, enforced by corporal puniſhment, which might be inflicted upon the offender, if ſubject to Scots juriſdiction; but the regulations in queſtion are not mere perſonal prohibitions to the ſubjects of Scotland, but direct the conſtruction of dam-dikes, in ſuch a manner as can only be executed by an act of power in and upon the river.

Replied for the purſuers: The general propoſition maintained by the defenders neceſſarily leads to this conſequence, that the Tweed is ſubject to no law whatever, either as to crimes committed upon it, or the aſcertaining rights of property in it. Such propoſition ought to be well ſupported before it be received. It is clearly contrary to the general rule laid down by the writers on the public law in caſes of this kind; and there is nothing urged by the defenders to ſhow, that this river is, or ought to be, an exception from the general rule. All that appears from the border-laws, is, that controverted rights between the ſubjects of the two kingdoms were determined by treaty, or by the warden of the marches. Thoſe could not be determined otherways, both becauſe the laws of either kingdom could not reach the ſubjects of the other,

and

and becauſe the determining thoſe queſtions was in effect ſettling the limits of the two ſtates. But the preſent queſtion is extremely different: Lord Home's fiſhing is undoubtedly a Scots eſtate, being derived from and held of the King of Scotland. It is of no conſequence that Lord Home and Lord Tankerville have poſſeſſed their fiſhings jointly. As they derived their right from the ſovereigns of two ſeparate and independent ſtates, there could be no legal community between them. Their joint poſſeſſion muſt have been by agreement for their mutual conveniency; but ſuch agreement could not exempt either from ſubjection to the laws and courts of their reſpective ſtates.

Duplied: By the treaties above mentioned, proviſion was made for the puniſhment of crimes committed upon the borders; and, as the criminal law in both countries is nearly the ſame, and as both have a common intereſt in the river, the cogniſance of ſuch crimes might be competent to the courts of that country where the offender had his domicile, or was apprehended. The courts of each country too might determine civil queſtions between its own ſubjects, reſpecting their claims to eſtabliſhed rights in this river. Thus this court might determine between Lord Home and any other perſon claiming right to the fiſhing of Fairburn-mill, though it might not be competent for this court to execute regulations of a public nature in and upon the dikes and fiſhings within the river, in virtue of a Scots act of parliament.

The caſe is juſt the ſame with that of land-commonties upon the border, poſſeſſed jointly by Engliſh and Scots heritors. Though this court might determine between Scots heritors claiming the ſame intereſt in ſuch commonty, yet none of the public laws of Scotland, for example, thoſe as to hunting, fowling, muirburn, ſouming, rouming, diviſion according to the valued rent, &c. could be put to execution there. If this be the caſe of a commonty upon land, the ſame ought, *a fortiori*, to obtain in the river Tweed, which, by its nature, is public.

The defender's plea too is confirmed by the practice. The regulations of the act 1696 never were obſerved; nor, till this action, was there any attempt to enforce the obſervance of them in any part of this river, although they have been always obſerved and enforced in every river that is entirely within Scotland.

But, though the law ſtood otherwiſe with regard to the river in general, yet it would be incompetent for this court to interfere in the preſent caſe. By the treaty above quoted, it was agreed, that the fiſhings in this river ſhould be poſſeſſed in the ſame manner as formerly. The joint poſſeſſion of the two Earls muſt preſume *retro*. Of courſe, Lord Tankerville has a right, as a part of his Engliſh eſtate, to fiſh over the whole river jointly with Lord Home; and of this right he cannot be deprived in whole or in part by this court. An end cannot be put to this joint fiſhing any other way than by commiſſioners, as in antient times, or by an act of the united legiſlature of both kingdoms.

The Lords firſt found, 'That the act of parliament 1696 compre-
'hends the river Tweed, where that river runs within the juriſdic-
'tion of the courts at law in Scotland; and that the dam-dike, or
'dam-head, in queſtion, from the north bank of the river to the

'middle thereof, is ſubject to the regulation of that act; and, 'therefore, that the ſuſpenders ought to remove all nets and en- 'gines prohibited by that act, and ought to make a ſlop in the 'foreſaid part of the dam-dike, where the mid-ſtream, or current 'thereof, runs; and remitted to the Lord Ordinary to proceed in 'the cauſe accordingly.'

But, upon review, 'they found, That, in the ſpecial circumſtances 'of this caſe, the act of parliament 1696 does not extend to the 'fiſhing in queſtion, and remitted to the Lord Ordinary to proceed 'accordingly.'

A. R.

Act. *Solicitor Dundas et Patrick Murray.* Alt. *Rae et Lockhart.*

No. LXXVIII. *July* 1. 1768.

Mrs FLORENCE M'LEOD,

Againſt

Mr JOHN NICHOLSON, and the children of the deceaſed DONALD NICHOLSON.

A right aſſigned by a wife in her marriage-contract, tranſmits to the husband's heirs, though heirs are not mentioned.

DONALD Nicholſon, in 1757, married Mrs Florence M'Leod, relict of Archibald M'Queen, out of whoſe ſubjects ſhe was entitled to a jointure or liferent-annuity of 150 merks yearly.

After Mrs M'Leod's marriage with Mr Nicholſon, a poſt-nuptial contract was entered into, proceeding on the narrative of their being already married; that no contract had been extended; that Mrs M'Leod was not ſufficiently ſecured in a jointure, nor the children to be procreate of the marriage provided, or a tocher given to Mr Nicholſon, according as was communed upon between the parties, before and after marriage. Therefore the ſaid Donald Nicholſon binds and obliges himſelf, his heirs, &c. 'to 'ſecure the ſaid Florence M'Leod his ſpouſe, after his deceaſe, in life- 'rent, during all the days of her lifetime, in all and whole the intereſt 'of 2000 merks Scots;' if no children of the marriage, the wife is to have the intereſt of 3000 merks; and ſhe was farther provided to 700 merks, in compenſation of her terce of moveables, the half of the houſhold-furniture, and all the ſheep and goats that ſhould pertain to them, at the time of the huſband's deceaſe.

And, on the other part, the ſaid Florence M'Leod 'aſſigns and diſpones 'to,

'to, and in favour of the ſaid Donald Nicholſon, the intereſt of 3000 'merks money, provided to her in liferent, by the deceaſed Archibald 'M'Queen of Tott, by their contract of marriage, bearing date the 'day of years, with the contract itſelf, and all that has fol-'lowed or may follow thereupon; ſurrogating and ſubſtituting the ſaid 'Donald Nicholſon in her full right and place of the ſame, which aſſig-'nation ſhe binds and obliges herſelf to warrant from any fact or deed 'done by her, or foreſaids, prejudicial hereunto.'

Donald Nicholſon died in October 1761, leaving Mrs Florence M'Leod his widow, and a family of children under age. John Nicholſon brother to Donald, as pro-tutor for the children, took upon him the management of their affairs; and, ſoon after the huſband's death, the widow received the furniture, and ſheep and goats, to which ſhe was entitled, and ſhe was allowed for ſome years ſo uplift the 150 merks annuity, ſettled on her by her former huſband, with a view of compenſating the 700 merks, to which ſhe was entitled by her contract with Donald Nicholſon, in lieu of her terce of moveables.

After matters had remained in this ſituation for ſome years, Mrs M'Leod inſiſted in an action for payment of the 700 merks, due to her in conſequence of her contract of marriage with Mr Nicholſon, and likewiſe of 100 merks annuity ſettled on her by ſaid contract; and ſhe farther contended, that ſhe was ſtill entitled to uplift the annuity of 150 merks provided to her by her firſt huſband, which ſhe pleaded, was, by her contract with Mr Nicholſon, conveyed only to him perſonally, but not to his heirs or aſſignees.

It was, on the other hand, *contended* for the children of Donald Nicholſon, That the annuity of 150 merks, ſettled upon Mrs M'Leod by her firſt huſband, was effectually conveyed, by the contract, to Donald Nicholſon her huſband, and muſt go to his heirs, though not expreſsly mentioned; and as to the other claim of 100 merks annuity, ſettled by Donald Nicholſon on Mrs M'Leod, in the event of her ſurviving him, it was agreed it ſhould be paid her.

The queſtion turned entirely upon the import of the aſſignation by Mrs M'Leod, in her contract of marriage with Donald Nicholſon, and was taken to report by the Lord Coalſton Ordinary.

Pleaded for Mrs M'Leod: The conveyance of her former jointure to Mr Nicholſon, in the poſt-nuptial contract, was perſonal to him, without being granted to his heirs and aſſignees; therefore the contract could only give him right to the annuity, during the ſubſiſtence of the marriage, without tranſmitting it to his heirs; and, upon his death, the right again reverted back to Mrs M'Leod; that when it happens that a right is granted or conveyed to a perſon ſimply, without mention of heirs and aſſignees, it becomes a mere *quaeſtio voluntatis*, whether the right ſhall be held as perſonal to the acquirer for his lifetime, or ſhall tranſmit to his heirs; and that it was only from the nature of the ſubject, and preſumed will of the parties, that rights could be tranſmitted to heirs, where heirs were not expreſsly mentioned; as, in ſuch caſes,

caſes, heirs could have no claim under the words of the deed; that the ſubject here conveyed was not a right of property, being no more than an annuity in favours of the widow, perſonal to her, and granted for the ſole purpoſe of affording her aliment and ſubſiſtence, after her firſt huſband's deceaſe; and, in ſupport of this plea, ſundry authorities were referred to. *l.* 25. §. 1.; *ff. lib.* 2. *tit.* 14; *l.* 7. §. 8. *eod.* Stair, lib. 3. tit. 5. §. 5. Lyon *contra* Stewart, March 20 1683, Durie.

Anſwered for Mr Nicholſon: That, independent of any deed, Donald Nicholſon, while he lived, was *jure mariti* entitled to uplift the annuity ſettled on his wife by her former huſband; ſo that, unleſs the aſſignation in the contract carried this annuity to Mr Nicholſon's heirs, it could carry nothing; that it is a general maxim, *qui providet ſibi, providet haeredibus.* If a right is meant only to be temporary, and limited to the lifetime of the diſponee, ſuch limitation muſt be expreſſed in the deed, otherwiſe the right will be underſtood to go to heirs, whether mentioned or not: That this cannot be conſidered as a *quaeſtio voluntatis*, the aſſignation to the annuity being abſolute and unlimited; and that, in all queſtions where perſons have been called to a ſucceſſion, without heirs being mentioned, where a competition has enſued between the heirs of the perſon called to the ſucceſſion, and the next ſubſtitute, the heirs have conſtantly been preferred, though not particularly mentioned; Dictionary, *voce* Succeſſion, vol. 2. p. 399.

'Upon report of Lord Coalſton, the Lords found, That the annuity 'in queſtion returned to Mrs M'Leod, and did not deſcend to her 'deceaſed huſband's heirs.'

But, on a reclaiming petition for Mr Nicholſon, with anſwers for Mrs M'Leod, the Lords altered this interlocutor, and found, 'That the 'aſſignation in the contract of marriage between the purſuer and 'the deceaſed Donald Nicholſon, did carry not only the annuity 'which fell due during the marriage, but alſo the annuities which 'were to fall due thereafter during the life of the purſuer.'

'And to this laſt interlocutor the court adhered, upon adviſing a re-'claiming petition for Mrs M'Leod, with anſwers for Mr Nicholſon.'

A. E.

For Mrs M'Leod, *Dav. Rae*, and *B. W. M'Leod.*
For Mr Nicholſon, *Ilay Campbell*, and *Al. Elphinſton.*

No

No. LXXIX. *July* 29. 1768.

WILLIAM RALSTON Surgeon in Glaſgow,

Againſt

GAVINE PETTIGREW.

One cannot uſe one's property ſo as to do real damage to that of another.

THE defender, proprietor of a field in the town of Glaſgow, conſiſting of ſome acres adjacent to a garden belonging to the purſuer, having found clay fit for making bricks, erected a brick-kiln about thirty feet diſtant from the march.

The purſuer brought an action, ſetting forth, that this brick-kiln did damage to his garden, and concluding, that the defender ſhould be decreed to remove it to ſuch a diſtance, as that it might be attended with no prejudice to the purſuer's property.

A proof having been allowed before anſwer, it appeared, that part of the march-hedge oppoſite to the kiln was dead, and that the trees, buſhes, and graſs in the purſuer's garden for ſome way from the march had ſuffered by the heat of the kiln.

Pleaded for the defender: Every perſon is entitled to uſe his property in the way that may be moſt profitable to him, though a conſequential damage ſhould thence ariſe to his neighbour. From this general principle have ſprung the variety of ſervitudes that make ſuch a figure in the law, and which are nothing elſe but reſtraints from uſing one's property to the prejudice of others. Such are the ſervitudes, *altius non tollendi*, *ne luminibus officiatur*, &c. The neceſſity of thoſe ſervitudes for ſuch reſtraint clearly evinces the general principle; and, accordingly, it has been found, that, where there is no ſervitude, one may build one's houſe to any height, though the conſequence ſhould be to ſtop all the lights in the houſe of another; 10th March 1613, Sommervail.

This general principle admits of two limitations only; one, that the exerciſe of one's property muſt not be merely in *aemulationem vicini*; the other, that it muſt not be a public nuiſance. The preſent caſe falls under neither of theſe. The brick-kiln brings conſiderable profit to the defender; it is likewiſe of extenſive public utility; and its preſent ſituation is the moſt convenient, being juſt by the clay-pit.

There was a caſe lately decided by the court, extremely ſimilar to the preſent, between Mr Frazer writer to the ſignet and Mr Dewar of Vogrie, where it was found, that Mr Dewar was not obliged to remove a lime-draw-kiln, built juſt upon his march, and very near Mr Fraſer's houſe.

Anſwered for the purſuer: Beſides the two admitted by the defender, there is a third limitation of the general rule as to the uſe of property, viz. that it do not encroach upon, or directly deſtroy that of another: Thus, if one has a river or ſtream of water running through his ground, it is an eſtabliſhed point, that he cannot erect any work upon it which may hurt the property of the inferior heritors, by rendering the courſe more rapid, or by regorging, do damage to that of the ſuperior heritors. In ſuch caſe, there is no need to inquire, whether what has been done was *in aemulationem* or not. The proper place for that limitation is where ſomething has been done, which, though diſagreeable, or even prejudicial to a neighbour, yet does not directly encroach upon, or deſtroy any part of his property.

There is a ſolid diſtinction betwixt the caſe of Mr Fraſer and the preſent. Mr Fraſer complained, that the ſmoak of the lime-kiln might, when the wind blew from a certain quarter, be offenſive only, and render his dwelling leſs agreeable. Here the defender's kiln does real damage to the purſuer's property.

'The Lords, in reſpect of the real damage done to the trees and 'plants in the purſuer's garden, by the vicinity of the defender's 'brick-kiln, found the defender was obliged to remove ſaid kiln, 'at a diſtance ſufficient to protect the garden from ſaid damage, 'and remit to the Lord Ordinary to proceed accordingly.'

A. R.

Act. *Lockhart.* Alt. *Croſbie.* Clerk, *Kilpatrick.*

No. LXXX. *July* 30. 1768.

ROBERT JOHNSTON, JAMES BEVERIDGE, and JOHN GIBB,

Againſt

The DUKE of HAMILTON.

Poſſeſſion of an uncultivated commonty by paſturage and caſting feal and divot, upon a title of part and pertinent, infers a right of common property.

THE barony of Kerſe, including the muirs of Reddingrig and Whiteſiderigg, belonged antiently to the abbacy of Holyroodhouſe. Prior to 1552, ſeveral farms of this barony had been feued out by the abbacy, with part and pertinent. In that year, the remainder were feued to the family of Hamilton, who having afterwards acquired the ſuperiority, again feued out ſome of them, likewiſe with part and pertinent.

Ro-

Robert Johnſton, and others, held their rights in this way, partly derived from the abbacy, partly from the family of Hamilton. In a proceſs of diviſion of thoſe muirs at their inſtance, it appeared, that the poſſeſſors of their lands had immemorially paſtured their cattle, and caſt feal and divot upon the muirs: And that the Duke, beſides poſſeſſing in the ſame way by his tenants, had wrought coal in the commonty. The queſtion came to be, Whether the purſuers had a right of ſervitude or common property?

It was *pleaded* for the Duke, That he is proprietor of theſe muirs, except in as far as his right is limited by thoſe of the purſuers. What was conveyed to them as part and pertinent can only be known from their poſſeſſion; and, as their poſſeſſion goes no farther than to paſturage, feal, and divot, their right of courſe reſolves into a ſervitude for theſe purpoſes. It is every where laid down in our law-books, that a ſervitude of paſturage, feal, and divot may be acquired by preſcription; but, how can this be done but by poſſeſſion ſuch as that of the purſuers?

It is a rule in ſuch caſes, 'that, if one of the parties has exerciſed all 'the acts of property of which the ſubject is capable, while the poſſeſ-'ſion of the other has been confined to particular and inferior acts, as 'to paſturage only, or to caſting feal and divot, the firſt is to be deem-'ed ſole proprietor, and the other to have merely a right of ſervitude;' Erſkine, *B.* 2. *t.* 6. § 6. By this rule, the Duke's having wrought the coal, ſeems deciſive in his favour. Indeed, in the caſe of common property, it ſeems impoſſible that any one can have a right to work coal; for, as all have a right, *pro indiviſo*, to each part of the common ſubject, no one can exerciſe his property in ſuch a way as to conſume the ſubject.

Anſwered for the purſuers: A right of ſervitude over the property of another is not to be preſumed. Where there is no limitation in the grant, the poſſeſſion of any particular ſubject, as part and pertinent of another, muſt be attributed to a title of property, provided the poſſeſſion has been ſuch as is conſiſtent with the idea of a right of property.

The meaning of the rule laid down by Mr Erſkine is this: That, where one has had full poſſeſſion of the ſubject, and the poſſeſſion of another has been limited to particular acts which fall ſhort of the *common* and *ordinary* uſe of the ſubject, then the laſt is preſumed to have only a right of ſervitude; and juſtly, becauſe ſuch poſſeſſion is in ſome meaſure inconſiſtent with the idea of property. But the ſubject in queſtion being wild and uncultivated, and no part of it having ever been ploughed by any perſon intereſted, the purſuers, while they paſtured their cattle and caſt feal and divot upon it, exerciſed all the common and ordinary acts of poſſeſſion incident to property of that kind. That being the caſe, they muſt be underſtood to have a right of property; and it cannot have the effect to deprive them of this right, either that they themſelves have not exerciſed it in every poſſible way which they might have done, or that ſome *extraordinary* acts of poſſeſſion have been exerciſed by others.

It does not follow from this, that a ſervitude of paſturage, or of feal and divot, may not be acquired by preſcription upon a clauſe of part and per-

pertinent; for, wherever the acts of poſſeſſion have been ſo limited in their nature, as not to amount to the common and ordinary uſe of the ſubject, there the right will be conſtrued to be a ſervitude only.

The Duke likewiſe *contended*, That, ſuppoſing the purſuers ſhould be underſtood to have a right of property, yet that ought to be with exception of the coal, upon this ground, that their rights being eſtabliſhed merely by poſſeſſion, they could not acquire a right to the coal, which they never poſſeſſed.

Anſwered: Suppoſing the purſuers were here founding upon a preſcriptive right, they would notwithſtanding have a right to the coal. Where one has acquired a preſcriptive right to the property of land, he, of courſe, acquires a right to the coal and all minerals, though none of theſe may have been ſought for during the currency of the preſcription.

But the purſuers do not found upon a preſcriptive right; their rights flowed *a vero domino*. The poſſeſſion, which is proved to have been immemorial, and which, of courſe, preſumes *retro* to the date of the original grants, is only founded on, to ſhow what was conveyed by thoſe grants. This, it has been ſhown, was a right of property, which muſt alſo imply a right to the coal. It is of no conſequence that the family of Hamilton have wrought coal. Since the poſſeſſion of the purſuers has been ſuch as both to prove and preſerve a right of property, it cannot alter the nature of their right, that another having intereſt in the commonty has exerciſed more acts of poſſeſſion than they.

'The Lords found, That Robert Johnſton, James Beveridge, and John 'Gibb, and their predeceſſors and authors, had immemorially poſſeſſed 'the ſaid muirs as part and pertinent of their lands; and therefore 'found, that they had a right of common property in ſaid muirs, 'and were entitled to a ſhare in the diviſion, effeiring to the valued 'rent of their reſpective lands; and found, that, after the diviſion, 'they ſhould, in all time coming, have the ſole and excluſive right 'of working coal within the limits of the ſhares of the muir to be 'ſet off to them; and that the Duke ſhould have no power of 'working coal, or other minerals therein.'

A. R.

Act. *M'Queen.* Alt. *Sir A. Ferguſon.*

No. LXXXI.

No. LXXXI. *Auguſt* 5. 1768.

LAWSON, JARDINE, and Company, Merchants in Dumfries,

Againſt

ADAM THOMSON Tackſman of the meal market there.

A duty granted upon what ſold in the market-place, not to be eluded by ſelling elſewhere.

THERE is an unprinted act of parliament dated Auguſt 12. 1662, of the following tenor: 'The eſtates of parliament having heard a 'ſupplication, preſented to them by the provoſt and baillies of Dumfries, 'for themſelves, and in name of the ſaid borough, ſhewing, That the 'inhabitants of the ſaid borough and ſheriffdom of Dumfries have been 'greatly damnified through the expences of the meal-market being un-'covered, to the great diſadvantage of buyer and ſeller, and ſpoiling of 'the meal in wet and rainy weather; humbly therefore deſiring, that, 'towards the building and maintaining an fabric and cover on the ſaid 'meal market, an impoſition might be laid on each boll of meal, ſold 'within the ſaid burgh, as the ſupplication bears; which, with an de-'claration under the hand of thoſe who are members of Parliament, and 'who have intereſt in the ſaid ſhire, conſenting, that four ſhillings 'Scots be impoſed upon the load of meal, ſold in the ſaid market, being 'taken into conſideration, the King's majeſty, with advice and conſent 'of his eſtates of parliament, do hereby grant warrant and power to 'the provoſt, baillies, and council of the ſaid borough, to build and 'cover a meal market, in the moſt convenient place within the ſaid 'borough they ſhall think fit, but prejudice of any private man's inte-'reſt in that place; and, for their better bigging and upholding the 'ſame, gives warrant and power to the magiſtrates and council foreſaid, 'and their ſucceſſors, and ſuch as they ſhall appoint, to uplift and col-'lect four ſhillings Scots of cuſtom, for ilk ſack and load of meal, 'brought to the ſaid market, to be ſold therein, in all time coming, as 'well from freemen inhabitants of the ſaid burgh, as from ſtrangers, 'importers thereof by ſea and land.'

The purſuers having imported a conſiderable quantity of meal, and ſold it in their ware-houſes, the defender purſued them before the magi-ſtrates, for payment of the duty, and obtained decree.

The purſuers brought a reduction of that decree, and *contended*, That by the act of parliament, the duty could only be exacted for meal ſold in the market-place, and that this limitation deſerved the more regard, that it appeared to have been made on purpoſe, and in oppoſition to the requeſt of the magiſtrates, for a duty upon all meal ſold within the borough.

Anſwered, The magiſtrates have been in the conſtant and immemo-rial practice of obliging the inhabitants either to bring the meal to the market-place, or of making them pay the duty, if allowed to ſell the meal in their own warehouſes.

Obſerved from the bench : As the town was at the expence of rearing and maintaining the market-place, it were hard upon them, and indeed to circumvent the law, to allow ſelling elſe-where, without paying duty; a duty on what ſhould be brought on the market-day, could not be eluded, by fetching in a day before.

'The Lords repelled the reaſons of reduction, and aſſoilzied.'

A. R.

Act. *M'Kenzie.* Alt. *Croſbie.* Clerk, *Kilpatrick.*

No. LXXXII. *December* 13. 1768.

JAMES WRIGHT Tackſman of Milntoun-mill,

Againſt

THOMAS RANNIE Tenant in Huntlaw, and JAMES PRINGLE Tenant in Limpuckwells.

Thirlage of victual in general does not comprehend wheat, where the mill is not properly conſtructed for grinding it.

THE defenders, by their leaſes, were bound to grind all their *grindable corns* at Milntoun-mill, and, for ſome time after the commencement of their tacks, manufactured their wheat with their other grain at that mill; but ſome mills with marble mill-ſtones for grinding wheat having been erected in the neighbourhood, and they having carried their wheat to theſe, the purſuer brought a proceſs againſt them for abſtraction.

Pleaded for the defenders: The mill being a common corn-mill, is not fit for grinding wheat, and therefore that ſpecies of grain cannot be underſtood to be comprehended under the aſtriction; ſo it was found, 16th July 1768, Couſton *contra* tenants of Pitreavie.

Anſwered for the purſuer: Wheat was in uſe to be ſown in the defenders farms prior to their tacks, and yet they became bound to grind all their *grindable corns* at this mill. As the words comprehend wheat; ſo the practice of the defenders in carrying their wheat to the mill for ſeveral years after their tack, ſhews their ſenſe that they were bound to grind it there. This being the caſe, it ought not to exempt them from the thirlage, that mills were afterwards erected of a better conſtruction for grinding wheat. Improvements may be made upon mills of every kind; but that ought not to defeat contracts of thirlage entered into when ſuch improvements were unknown.

In the caſe of Pitreavie, though it appeared that wheat had been ſown

in

in the land about a century before, yet it had been diſcontinued for a conſiderable time previous to the commencement of the tacks.

'The Lords aſſoilzied the defenders.'

A. R.

Act. *Arch. Cockburn.* Alt. *Rob. Sinclair.* Clerk, *Gibſon.*

No. LXXXIII. *December* 13. 1768.

JOHN COLTART Writer in Dumfries,

Againſt

JOSEPH FRASER of Little Cocklick.

Effect of a clauſe cum molendis et multuris *in the* tenendas *of a charter from a ſubject.*

IN 1554, the forty-nine merk two ſhilling-land of Kirkpatrick-Durham, with the mill thereof, and aſtricted multures, were feued by the abbacy of New-abbay, or Sweetheart, to the Earl of Nithſdale.

Theſe lands had been alienated by the family of Nithſdale at different periods. The lands of Drumconchra being part of them, had been early feued to M'Lellan of Barclay, and came into the perſon of the defender in 1754.

The purſuer having acquired right to the mill in 1763, brought a declarator of aſtriction againſt the owners of the ſeveral lands comprehended under the forty-nine merk two ſhilling-land of Kirkpatrick-Durham.

By the defender was produced a charter from the Earl of Nithſdale 1706, containing a *novodamus.* In the *tenendas* were the words, *cum domibus, molendinis, et multuris*, and the feu-duty was declared to be *pro omni alio onere.* There was likewiſe produced a charter of reſignation from the crown 1715, with the *tenendas* in the ſame terms. In the title-deeds of the other lands, the thirlage was expreſsly reſerved.

It was proved, that the tenants of Drumconchra were in uſe to grind their corns at this mill, and to pay inſucken multure; that in one inſtance they had aſſiſted to repair the dam-dike, in another to lead the mill-ſtone, and, in a third, to provide thatch to the mill. There were likewiſe produced for the purſuer three decrees of Lord Nithſdale's multure-court; one in 1713, in which the tenants of theſe lands were called, but judicially paſſed from by the leſſee of the mill; another in 1725, in which they were decreed in a fine for contumacy; and a third in 1726, from which it appeared, they had judicially acknowledged the abſtraction, and engaged to ſatisfy the tackſman of the mill. All the particulars proved were within thirty-eight years preceeding 1754, when the defender

defender acquired the lands. From that time the defender had forbid his tenants to attend the mill.

Pleaded for the defender: A charter from a ſubject-ſuperior, with mills and multures in the *tenendas*, imports a diſcharge of thirlage. 'The moſt ordinary way,' ſays Lord Stair, 'of taking off thirlage, is 'by granting a charter, containing mills and multures in the *tenendas*;' new edit. p. 305. § 24. That the thirlage was meant to be diſcharged in this caſe is the more preſumable, 1*ſt*, Becauſe, the charter declares the feu-duty to be *pro omni alio onere*; and, 2*dly*, Becauſe, in the charters of all the other lands within the thirl, the thirlage is expreſsly reſerved.

As this ſervitude requires a title in writing, the thirlage having been diſcharged, could not be of new created by the practice of going to the mill. Beſides, the practice of going to the mill is not proved for forty years, and, on other accounts, deſerves little regard. There was little grain ſown in theſe farms till lately; and they having been for more than thirty years in the hands of truſtees, who lived at a diſtance, the tenants might have been awed or deceived by the managers for the family of Nithſdale; and it was during that period the uſurpation ſeems chiefly to have taken place.

Neither ought any weight to be laid upon the decrees; for, 1*ſt*, Lord Nithſdale having alienated both property and ſuperiority of the lands, his bailie could have no juriſdiction over the poſſeſſors. 2*dly*, The owners of the lands were not called. 3*dly*, In one of the decrees, the tenants were paſſed from, which might have been on account of their not being liable. 4*thly*, In another, it would appear they had paid no regard to the court, for they were decreed in a fine for abſence; which fine never was exacted.

Anſwered for the purſuers: The words *cum molendinis et multuris*, in the *tenendas* of a charter, do not neceſſarily import a diſcharge of thirlage. It is the purpoſe of the diſpoſitive clauſe, to ſpecify the particulars meant to be conveyed. The clauſe of *tenendas*, is ſolely meant for pointing out the ſuperior, and the ſpecies of the holding. A number of ſupernumerary words are indeed, from cuſtom and anxiety, thrown into this clauſe; but theſe ought to operate no further than they are warranted by the diſpoſitive clauſe. It is an agreed point, that, in charters from the crown, the words *cum molendinis et multuris* in the *tenend.* clauſe have no effect whatever. In charters from ſubjects, they are regarded in the ſame light, if it appear that the poſſeſſors of the thirled lands have been in the practice of attending the mill, after the date of the charter. So it is laid down by Lord Stair, p. 305. §. 24. and ſo it was found, July 19. 1758, M'Nab; and again November 17. 1759, Yeaman. The words, *pro omni alio onere*, reſpect only burdens that may affect the lands, not ſuch as may affect the fruits; Bankton, v. 1. p. 688.; § 52. and 53.

The proof, in this caſe, would be ſufficient even to conſtitute a thirlage, eſpecially as the mill belonged to church-men. But as the queſtion here is not with regard to the conſtitution of a thirlage, it is unneceſſary to enter into a nice diſcuſſion of the proof. The thirlage having been

been conſtituted before the proof is only to ſhow, whether it was meant by theſe words in the charter, to diſcharge the thirlage. Lord Stair ſays, that, in ſuch caſe, uſage of grinding the corns at the mill for ſeven years only ſubſequent to the date of the charter is ſufficient to ſhow, that an immunity was not deſigned. Here the attendance on the mill is proved for near 40 years, and, taking it altogether, ſeems quite irreconcileable with the ſuppoſition, that it was the underſtanding either of the granter or grantee that the thirlage was diſcharged by this charter.

Obſerved from the bench: In the caſe of M'Nab, the court was equally divided, the preſident having been againſt the judgement.

'The Lords aſſoilzied the defender.'

A. R.

Act. *Armſtrong*, Alt. *Cha. Brown.* Clerk, *Kirkpatrick.*

N. B. The purſuer having appealed, the houſe of Lords, January 28. 1784. 'Ordered and adjudged, that the appeal be diſmiſſed, and 'that the interlocutors therein complained of be affirmed, with L. 100 'coſts.'

No. LXXXIV. *January* 17. 1769.

ANGUS SINCLAIR,

Againſt

JAMES HAMILTON, and others.

Malverſation of juſtices of peace. Pointing by an officer of exciſe, in virtue of their decreet.

ANGUS SINCLAIR change-keeper in Hunthill, on an information from the collector and ſupervisor of exciſe at Glaſgow, was tried and fined for retailing foreign ſpirits without a licence, by Mr Hamilton and other juſtices of peace, for the ſhire of Lanark; and his effects having been pointed, in virtue of their decreet, he brought an action of oppreſſion and damages againſt the juſtices, and againſt the officer of exciſe, and conſtable who diſtrained.

Alledged for the purſuer: 1. The information againſt him was irregular and informal, as it comprehended a number of delinquencies, unconnected with each other, and committed by different perſons. 2. He was not regularly cited. 3. The evidence was not taken down in writing. 4. The action was preſcribed.

Anſwered for the juſtices: 1. The including a variety of offences and offenders in one information, is agreeable to practice, and the complaint was ſuch as is generally exhibited. 2. The purſuer was cited in the

 uſual

uſual manner. 3. Practice has authorized the not taking down a proof in writing, and ſuch practice is founded on public utility. 4. The action was inſtituted within the term of preſcription.

Charged againſt the officer of exciſe and conſtable: 1. That their entering the purſuer's houſe, under authority of a writ of aſſiſtants, without information of prohibited goods, was irregular and illegal. 2. That the diſtreſs following on the decreet of the juſtices was a ſpuilzie, as there was neither a warrant to diſtrain, nor were the formalities of a poinding obſerved.

Anſwered: 1. An officer who miſuſes a writ of aſſiſtants can only be puniſhed by the court of exchequer. 2. When an offender refuſes to pay, the law allows a diſtreſs and ſale of the offender's goods, by act 12. Charles II. referred to in acts 16. and 24. George II.

'The Lords ſuſtained the defence proponed for the juſtices, collector, 'and ſuperviſor, and aſſoilzied; but ſuſtained action againſt the 'officer of exciſe and conſtable, and allowed a proof, with reſpect 'to the execution of the poinding.'

P. C

Act. *Croſbie.* Alt. *Sol. Dundas.* Reporter, *Barjarg.* Clerk, *Gibſon.*

No. LXXXV. *January* 24. 1769.

ROBERT BOYD Suſpender,

Againſt

ADAM and THOMAS MILLARS, &c. Chargers.

Juriſdiction of juſtices of peace in private property. Prorogation of their juriſdiction.

ROBERT BOYD was ſued before the juſtices of peace for the ſhire of Ayr, for payment of graſs-mail, and being found liable, ſuſpended their decreet. The queſtion before the court turned on theſe points: '1*mo*, How far the juſtices of peace had a proper juriſdiction to try this 'caſe; and 2*do*, Suppoſing they had no proper juriſdiction, how far 'their juriſdiction was, or could be prorogated by the parties.'

Pleaded for the ſuſpender: Juſtices of peace have no ordinary or radical juriſdiction in civil matters. They are appointed for preſerving the peace, for preventing delinquencies, and for puniſhing thoſe who offend againſt the peace, but not for chaſtiſing other delinquents. Their juriſdiction is entirely criminal, nor can it be extended, except as to citation in ſervants fees, and other ſmall matters ſpecially enacted by ſtatute.

tute. Having no proper juriſdiction in private property, the court of ſeſſion has checked every attempt to extend their bounds, and juſtices of peace have been found incompetent judges on the paſſive titles; 15th December 1710, Forſyth; in ſcandal, or verbal injuries, 17th July 1711, Sharp; in payment of a verbal legacy, 13th February 1759, Barclay; in a debt by a written obligation, 9th March 1763, Dewar.

There can be but little expediency in having trifling matters determined by juſtices of peace, where there is a judge-ordinary with unexceptionable juriſdiction; but, whatever may be the caſe with regard to expediency, the juriſdiction of juſtices can only be eſtabliſhed by act of parliament.

2*do*, Juſtices of peace not having a proper juriſdiction, their juriſdiction cannot be prorogated. *Prorogatio de cauſa in cauſam* is rejected by law and in practice; nor can a juriſdiction in particular articles, given by expreſs ſtatutes, be extended to cauſes different from thoſe expreſſed in theſe ſtatutes. That conſent alone cannot confer juriſdiction, was determined by 13th February 1759, Barclay.

Urged for the chargers: The expence of litigation before the judge-ordinary, renders it highly expedient for juſtices of peace to judge in ſmall debts; and the conſequences of aboliſhing their juriſdiction in civil cauſes of ſmall value would be fatal. Though ſuch juriſdiction may not be conſtituted by expreſs ſtatutes, immemorial practice has given ſuch ſanction to the juriſdiction of juſtices of peace in trifling claims, that it may be conſidered as part of our conſuetudinary law. Where expediency has required it, juriſdiction has been eſtabliſhed by practice alone. The juriſdiction of the bailie-court in ſmall debts and ſmall cheats, is founded in practice, not on ſtatute.

2*do*, The legiſlature has not declared the juriſdiction of juſtices of peace incapable of prorogation; and, without ſuch declaration of the legiſlature, the juriſdiction of any judge, though originally incompetent, may be prorogated by conſent of parties; *Voet. Comment. de juriſdict.* § 14. *l.* 1. *Cod. de juriſd. omn. judic.* The juriſdiction of juſtices of peace in ſmall debts and little commercial queſtions, in proceſſes concerning baſtard-children, horſe-dealers, &c. has, in innumerable inſtances, been ſuſtained. The juriſdiction of the juſtices, if it can be prorogated, was prorogated in this caſe. The ſuſpender, when cited, inſiſted in his defences, and, by repeated acts, acquieſced in the juriſdiction of the juſtices.

'The Lords repelled the reaſons of ſuſpenſion, and found the letters 'orderly proceeded.'

P. C.

For the Suſpender, *D. Dalrymple.*
For the Chargers, *Ja. Boſwell.*

Reporter, *L. Juſtice Clerk.*
Clerk, *Hume.*

No. LXXXVI.

No. LXXXVI. *January* 25. 1769.

ROBERT STEVEN, &c. Truſtees for the Creditors of ALEXANDER ARBUTHNOT,

Againſt

JOHN CRAICH and JAMES MITCHEL.

Validity of a poinding.

ALEXANDER ARBUTHNOT merchant in Montroſe, poſſeſſed a timber-yard in the links of Montroſe, incloſed on one ſide by cloſe ſheds for workmen, and on the other three by a paling of wood from ſix to eight feet high, with an opening of about two inches between the rails or ſtakes. On the north-weſt ſide there were a gate and a ſmall door, the uſual entries to this wood-yard, ſecured by locks; on the ſouth-weſt ſide there was another large gate for the purpoſe of receiving timber and carriages from the ſea-ſide, made of paling like the reſt of the incloſure, without lock or bands, but ſecured on the inſide, by three trees, of 12 to 14 feet long, the greater ends of which were fixed or reſted againſt the ground, and the ſmaller ends againſt the back, or upper croſs-bar of the gate.

Charles Thomſon, a meſſenger employed by Craich and ſome others, finding the gate and door on the north weſt ſide locked and ſecured, without application for letters of open doors, poinded and carried off the wood in the yard, by removing, on the outſide, the trees that ſupported the ſouth-weſt gate.

In their action for reduction of the execution of the poinding, it was *pleaded* for the purſuers, That, in every ſtep of diligence, there is a ſpecial warrant, pointing out what the party may do upon it, and that he muſt be reſtricted by the authority of his warrant. The diligence of the defenders entitled them to poind the effects of their debtor, provided they could come at them in a regular manner, but did not authoriſe them, without letters of open doors, to break into his houſe or incloſures, to lay hold of thoſe effects. In no caſe whatever can a door, locked or ſecured in ſuch a way as to exclude indifferent perſons from acceſs without violence, be opened by a meſſenger, in virtue of a horning or ſimple warrant to poind. Letters of open doors, which mention a dwelling-houſe and lock-faſt doors, are not ſolely intended to prevent a forcible entry into the *dwelling-houſes* of debtors, as being a ſort of ſanctuary; if the goods are *within cloſe doors*, there is no diſtinction whether the goods are in a dwelling, or in a ſtable, a park, or any other incloſure, providing they are ſo ſecured, that the meſſenger cannot get at them, without forcing open a door. The uſual ſtyle in captions, *ſteiked and lock-faſt places*, applies not only to thoſe that are locked, but to thoſe that are ſteiked, or ſhut in ſuch a manner, as that the meſſenger cannot enter by the common door. The plain ſenſe of the law is this, that a meſſenger having a warrant to poind, muſt not enter clandeſtinely

clandeſtinely or violently; he muſt not get in at the window, or climb over the wall, but muſt enter fairly and directly as other people do; and, if an outer door is ſecured, ſo as not to be opened without violence, he cannot legally force his way, whether ſuch door or gate is ſecured by a lock, by a bar, or by trees, as in the preſent caſe, placed againſt it in the inſide, by way of barricade.

Anſwered for the defenders: That, though the origin of letters of open doors, or the particular circumſtances in which theſe are requiſite, are not clearly ſet forth in the law-books, it is a general principle of law, that a creditor may poind his debtor's effects, wherever he can find them. The diſtinction between perſonal and real diligence, is to be found in the letters themſelves. 'The will of a caption, as obſerved 'by Lord Bankton, B. 4. T. 41. § 8. is to break open doors, and to 'make the king's keys; but, in poindings, the meſſenger cannot forcibly 'enter, without letters for making patent doors; but, if he get entrance, 'he may break open cheſts, cabinets, or chambers, in order to diſtrin-'zie the goods therein.' This reſtriction in executing real diligence, gives a ſort of protection or privilege of ſanctuary to the domicile of the party; but the command in letters of open doors, 'that, if needs 'be, ye make ſtieket and lock-faſt houſes, yates, and doors, open and 'patent,' would ſeem to import, that it was the party's dwelling houſe, for the ſecurity of which this protection was intended; ſo that the meſſenger, if he found them locked, ſhould not be at liberty, by his own authority ,to break open the ſame, but to borrow the king's keys, by letters for making open doors.

But, whatever might be the caſe, with regard to houſes, otherwiſe fenced and ſecured, than by locked doors, it is impoſſible to conſider a timber-yard, fenced and incloſed as Mr Arburthnot's was, to be of ſuch a nature, as that letters of open doors ſhould be neceſſary to authoriſe the entry of a meſſenger, in order to execute the diligence of the law.

The facililty with which the meſſenger got entry ſhows, that the gate was not ſo ſecured as to require letters for open doors, ſince it would have been no ways faulty to have opened the latchet or ſneck of a dwelling houſe, without the aid of the king's letters.

Memorials having been ordered, with regard to the practice in poindings in ſimilar caſes, the following inſtances were produced by the purſuers; that at a poinding of cattle at a park of Brucehill in 1765, the meſſenger obtained letters of open doors, not being able to get acceſs by reaſon of ſteiked and lock faſt doors; that a meſſenger in poinding corn in a barn-yard, about 34 years ago, entered to the yard by ſtile or ſteps, the gate of the yard being padlocked; that he took out rips or ſamples of corn; but, before the corns themſelves were taken away, letters of open doors were obtained; that it appeared from the ſignet-records, that ſeven letters of open doors had been iſſued from Auguſt 1765, to June 1766, relative to opening ſhops, cellars, office-houſes, a lime or coach houſe, and cheſts or caſements.

The defenders, though they acknowledged they had not diſcovered any caſe preciſely ſimilar, averred, that the moſt reputable meſſengers

had agreed that they would not have heſitated to execute this poinding, in the way and manner it was done, without letters of open doors; that it is their practice, in executions of poinding, to enter into any place to which they have acceſs without violence, or breaking open ſteiked or lock-faſt doors; and that, though the door by which they mean to enter be ſhut, but not locked, if the impediment which keeps it cloſe can be removed, without breaking or demoliſhing the door, ſuch impediment is not conſidered as requiring letters of open doors.

'The Lords ſuſtained the defence againſt this action, and aſſoilzied 'the defenders; and, upon a reclaiming petition, adhered.'

P. C.

Act. *Rae.* Alt. *Lockhart.* Clerk, *Roſs.*

No. LXXXVII. *January* 25. 1769.

WILLIAM WILSON Aſſignee of JANET STEEL,

Againſt

ALEXANDER Earl of HOME.

An adjudication ſubſiſts as a ſecurity for expences, only to the amount of the penalties for which it is led; and, if led jointly for behooſ of the executor and the heir, the penalties fall to be proportioned between them.

IN the year 1638, James Earl of Home as principal, and others as cautioners, granted two bonds to Lawrence Henderſon, one for 3000 merks, with L. 300 of penalty, payable to Henderſon; and, failing him by deceaſe, to Barbara and Janet Henderſons, his daughters; the other for 4000 merks, with L. 400 of penalty, payable to Henderſon; and, failing him by deceaſe, to his daughters Agnes and Janet equally, their heirs, executors, or aſſignees.

Henderſon, in 1659 and 1660, by ſeparate conveyances, aſſigned theſe bonds to other two daughters, Iſobel and Margaret equally, their heirs and donators.

In 1663, the Earl, as principal, and certain cautioners, granted bonds of corroboration of theſe two debts, with intereſts due on them, to the ſaid Iſobel and Margaret Henderſons, their heirs, executors, or aſſignees; one for 3630 merks, and 400 merks of penalty, and another for 4840 merks, and L. 500 Scots of penalty, with intereſt from the next term.

Margaret Henderſon, who had right to one half of theſe debts, married Henry Alcorn, but without conveying to him her right; and, of this

this marriage there was a ſon, Richard Alcorn, heir to his mother, in her ſhare of theſe debts.

Richard Alcorn, in 1723, confirmed himſelf executor to his mother, then dead, in 1500 merks, as her half of the original bond of 3000 merks, with intereſt due thereon; but did not confirm her half of the other original bond; nor was he confirmed executor to his father in the annualrents of theſe ſums which belonged to him *jure mariti.*

Having erroneouſly ſet forth in his ſummons, 'That he was only 'lawful ſon and heir ſerved and retoured to the deceaſed Henry Alcorn 'his father, and that he was alſo executor decerned and confirmed to the 'deceaſed Margaret Henderſon his mother.' Richard Alcorn, in 1728, brought a proceſs on the paſſive titles againſt William late Earl of Home, brother to Earl Alexander, for 1500 merks, as Margaret Henderſon's half of 3000 merks contained in the firſt original bond, with intereſt from Martinmas 1638, being the original term of payment, and L. 100 Scots inſtead of L. 150, as the half of the penalty in that bond; and, 2*do*, for 2420 merks as her half of the principal ſum of 4840 merks contained in the bond of corroboration of the other original bond of 4000 merks, with intereſt from Whitſunday 1662, and L. 250 as half of the penalty in the bond of corroboration. The Earl having renounced to be heir, decreet *cognitionis cauſa* paſſed for the whole ſums libelled.

Upon this decreet, Richard Alcorn, in 1730, obtained an adjudication of the whole eſtate of Home, for payment of the ſums decerned for in the decreet of conſtitution, then accumulated to L. 13980 : 5 : 2 Scots, but with this variation from the conſtitution, that the half of the penalty in the bond for 4840 merks, is only 250 merks inſtead of L. 250.

On the death of Richard Alcorn, James Alcorn his ſon was ſerved heir to him; and, in 1747, Janet Steel, as creditor to Richard Alcorn, adjudged the above rights from James Alcorn as charged to enter heir to his father, and brought a proceſs of maills and duties.

The court, by interlocutors in 1765, found, 'That the principal 'ſums, as contained in the original bonds of 3000 and 4000 merks 'Scots, being heritable, as the law ſtood at the time when they were 'granted, were not rendered moveable, neither by the aſſignations, nor 'by the bonds of corroboration granted in the 1663; and conſequently 'that Richard Alcorn's confirmation, as executor to Margaret Henderſon, did not carry, or veſt in him, any right to her ſhare of the principal ſums contained in the original bonds;' but found, 'That the confirmation of Richard Alcorn, as executor to his mother, did carry her 'ſhare of the principal ſums contained in the bonds of corroboration '1663, in ſo far as the ſame were made up of bygone annualrents, and 'alſo the whole annualrents which had fallen due upon the bonds of 'corroboration from the death of Henry Alcorn his father; and therefore, in ſo far ſuſtained the decreets of conſtitution and adjudication 'at Richard Alcorn's inſtance.' Found, That Janet Steel, 'in virtue of 'her adjudication led againſt James Alcorn, has a ſufficient title to carry on this proceſs.' And, upon adviſing a reclaiming petition, with anſwers, ſuſtained 'the decreets of cognition and adjudication at Richard

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'chard Alcorn's inſtance, as a ſecurity for the ſaid part of the principal 'ſums, and haill annualrents due at, and preceeding, the death of Mar-'garet Henderſon, and *the neeeſſary expences as accumulated at the date 'of the ſaid adjudication*; and remit to the Lord Odinary to proceed 'accordingly.'

William Wilſon, as having right from Jane Steel, and from the heir of Margaret Henderſon, and the executor of Henry Alcorn her huſband, proceeded to ſupply the defects of the former diligence, and, in 1766, obtained and extracted a decreet for payment of the half of the two original bonds, principal and intereſt, ſo far as had been found to belong to the heir; and, particularly, for the one half of both the penalties of L. 300 and L. 400 Scots, contained in the ſaid two original bonds. He alſo, as in right of Henry Alcorn's executors, obtained decreet for the intereſt of the two bonds which fell under Henry Alcorn's *jus mariti*. And, as aſſignee to Janet Steel, he, in 1767, wakened, and inſiſted in her proceſs of maills and duties before the Lord Ordinary.

The article principally diſputed by the parties, was the extent of the expences, for which the adjudication fell to be ſuſtained as a ſecurity. The Lord Ordinary, by interlocutor 24th December 1767, found, 'That the adjudication being allowed to ſubſiſt as a ſecurity for the ex-'pences, does not render the adjudication broader than it was before, 'and thereby ſecure expences which were not adjudged for, but ſingly 'entitles the purſuer to hold the adjudication as a ſecurity for the expen-'ces therein adjudged for, in as far as he ſhall ſhow, that the neceſſary 'expences amounted to that ſum.' And it appearing that the adjudication had been led for 400 merks of penalties, and that the expences exceeded that ſum, his Lordſhip ſuſtained the adjudication as a ſecurity for expences to that amount.

In a reclaiming bill, it was *pleaded* for the defender, That, as the adjudication had been only ſuſtained for the ſums to which the executors of Margaret Henderſon had right, it could not be intended that the purſuer ſhould have the benefit of the penalties, ſo far as the ſame belonged to the heir, and not to the executor, or beyond what his author or executor could have adjudged for. The adjudication was led jointly for the behoof of the executor and the heir, upon debts *in cumulo*, and, in ſeparating their ſhares of the debts, the penalties adjudged for fall likewiſe to be divided between them. As the interlocutors only ſuſtain the adjudication, ſo far as the executor's ſhare of the debt extended, he can only have ſecurity for his expences, to the extent of the penalties to which he had right. The heir of the creditor is found entitled to the principal ſums of both the original bonds; the penalties, therefore, in theſe bonds, as acceſſories, muſt likewiſe belong to him. The executor's right then can only extend to the penalties in the bonds of corroboration, in ſo far as they exceed the penalties in the original bonds.

2*do*, Suppoſing the executor can take the benefit of the whole penalties adjudged for, the defender cannot likewiſe be liable to the heir of Richard Alcorn, in the very ſame penalties, for which the purſuer, as in his right, has taken decreet; but, if the penalties are not to ſuffer a

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proportional diviſion, the purſuer, who ſtands in right both of the heir and the executor, does, as in right of the executor, get his adjudication ſuſtained to the amount of the whole penalties adjudged for; and, at the ſame time, as in right of the heir, again levies theſe identical penalties. 3*tio*, The purſuer has no title to the benefit of the accumulation in one of the bonds of corroboration, upon which the adjudication did not proceed. The adjudication is only for the contents of the firſt bond of corroboration of the 4000 merks bond, and for the contents of the original 300 merks bond, without adjudging upon, or for the corroboration of the laſt bond.

Anſwered for the purſuer: The queſtion is not entire, for, being fixed by a judgment long ago become final, it cannot now be brought under review. But, in any event, it is clear from the interlocutors, that, in ſo far as penalties and liquidate expences were adjudged for, the adjudication muſt be ſuſtained as a ſecurity for the neceſſary expences that had been laid out, in ſeeing for, and ſecuring the debts as accumulated at the date of the adjudication. Penalties are *ſummo jure* due in default of payment, as ariſing *ex pacto* of the parties, though nothing ſhould be expended by the creditor; much more when the expences exceed the penalties, do the full penalties become due in equity. When a penalty is ſtipulated in any obligation in default of implement, the implementing in part will not liberate the debtor from the penalty, or any part of it; if in any particular the obligation is unimplemented, *ſtricto jure*, the whole penalty is forfeited; nor does it make any difference whether the creditor was purſuing for implement of the whole obligation, or only for implement in part. Had the heir of Margaret Henderſon had an intereſt in the adjudication, the penalties to be adjudged for would have fallen to be divided in proportion to the reſpective intereſts of the parties, as each would have borne a proportional part of the expence laid out; but the adjudication has not been ſuſtained, *quoad* the intereſt of Richard Alcorn as heir, but only in ſo far as he had an intereſt as executor to his mother. And, as the whole expence of diligence fell on him, it is but equitable that the whole liquidate expences adjudged for ſhould be applied towards his indemnification.

2*do*, Whether the penalties can again be levied by thoſe in the right of the heir, is not neceſſary to inquire into; but there is nothing abſurd in ſuppoſing, that one ſhould be ſubjected in penalties ten times over. There is no law that makes penalties only once exigible; the rule of law is, that, as often as a contract is infringed, the penalty is forfeited; and the party who, in procuring performance of articles, is obliged to lay out a ſum equivalent to the liquidate penalty, muſt be entitled, upon every breach of the contract, to demand payment of the liquidate penalty as the indemnification of his expences.

3*tio*, Richard Alcorn confirmed the 300 merks bond, and the confirmation mentions the corroboration thereof; the bond of corroboration, therefore, though not explicitly, is yet virtually adjudged for, as it ariſes totally from the contents of the original bond; and, if the original bond is adjudged for, the intereſt of the creditor in the whole debt muſt thereby be effectually ſecured.

'The Lords remitted to the Lord Ordinary, with power to call and 'hear parties.'

In conſequence of this remit, the Lord Ordinary found 'the purſu-
'er's adjudication in queſtion ſubſiſts only as a ſecurity for his ex-
'pences, ſo far as he has right to the penalties; and further finds,
'That it ſubſiſts as a ſecurity only for Richard Alcorn's ſhare of
'the ſums contained in the bond of corroboration of the bond for
'four thouſand merks, and of the ſums due by the original bond
'of three thouſand merks.'

P. C.

For E. of Home, *Rae*. For Wilſon, *M'Queen*. Clerk, *Home*.

No. LXXXVIII. *January* 25. 1769.

PETER LESLIE-GRANT of Balquhain, Purſuer,

Againſt

JAMES GORDON of Cobairdie, and others, Defenders.

Import of a clauſe in a tailzie. Preſcription.

IN the year 1679, Patrick Leſlie of Balquhain, afterwards Count Leſlie, in his marriage-contract with Mary Irvine, his ſecond wife, provided to the heir-male of that marriage, with the burden of his liferent, lands to the extent of 3000 merks yearly. This contract declares, that, if Patrick Leſlie ſhall ſecure the ſaid heir-male in lands, which he may afterwards conqueſt, to the aforeſaid amount, he ſhall be holden to accept of lands ſo to be conqueſted and acquired, and to renounce any claim to the lands now provided. In the year 1692, Count Leſlie ſettled the lands of Balquhain upon himſelf in liferent, and George Leſlie his eldeſt ſon of the ſecond marriage, and the heirs-male of his body, in fee; which failing, upon ſeveral ſubſtitutes, under ſtrict, prohibitive, irritant, and reſolutive clauſes, but with full power to him to alter the deſtination, or burden the lands.

This tailzie contains the following clauſe: 'And further, in caſe I 'ſhall happen to conqueſt, acquire, or ſucceed unto any lands, herita-'ges, &c. which I ſhall not otherwiſe diſpoſe upon in my lifetime, in 'that caſe I, by thir preſents, ſell and diſpone the ſaid lands, &c. ſo to 'be conqueſt or acquired by me, or whereunto I ſhall happen to ſuc-'ceed, and not diſpone thereupon in my lifetime, to and in favours of 'the ſaid George Leſlie, eldeſt lawful ſon of my ſecond marriage, and 'the heirs-male of his body; which failing,' &c. This tailzie was duly recorded, a charter was expede, and infeftment followed.'

In the year 1699, Count Leſlie having purchaſed the lands of Inch, took the diſpoſition thereof to himſelf in liferent, and to George Leſlie his lawful ſon of the ſecond marriage, and his heirs-male; which failing, to ſeveral ſubſtitutes, with reſerved powers to burden, ſell, or diſpone.

diſpone. Upon this diſpoſition, a charter was expede, and i..feſtment followed.

In the year 1700, Count Leſlie, in virtue of his reſerved powers, executed another tailzie, in ſome reſpects different from the former, with procuratory for reſigning not only the lands expreſſed in his former tailzie, 'but alſo all and ſundry whatever lands, baronies, &c. which I 'have already acquired, or may hereafter happen to conqueſt or acquire, 'to me the ſaid Patrick Count Leſlie in liferent, and to the ſaid George 'Leſlie my eldeſt lawful ſon by Mary Irvine, and the heirs-male of his 'body; which failing,' &c. By this dead, the heirs of tailzie are bound to adhere to, and fulfill the conditions, clauſes, and limitations, &c. 'ſpecified and contained in the former bond of tailzie, except in ſo far 'as altered by that ſecond deed.'

In the year 1706, Count Leſlie, in the marriage-articles of his ſon George Leſlie with Margaret Elphinſton, renounces, in favour of his ſon, and promiſed ſpouſe, the liferent-right of the lands of Balquhain, 'and ſicklike, all and haill the lands of the kirk-town and barony of 'Inch, with the pertinents, &c. free of all ſums due by the ſaid Pa-'trick Count Leſlie, which can any way affect the ſame; likeas, the 'ſaid Patrick Count Leſlie hereby renounces all power and faculty to 'burden the ſaid lands with any ſums of money in all time hereafter.'

On the death of Patrick Count Leſlie, George Leſlie poſſeſſed the eſtate of Balquhain, in virtue of the titles expede upon the deeds of entail; but he poſſeſſed the lands of Inch on the charter of infeftment expede in 1699. George Leſlie left two ſons, James and Erneſt. James, the eldeſt, poſſeſſed the lands of Inch upon his apparency, without making up titles.

Upon the death of James, Erneſt, in 1739, procured himſelf ſerved and retoured heir in ſpecial in the lands of Inch, to George Leſlie, his father, and was thereafter infeft in virtue of a precept from the chancery.

Erneſt likewiſe made up titles to the eſtate of Balquhain in terms of the deed of entail.

In 1735, Erneſt Leſlie executed a ſettlement in favours of himſelf and his heirs, the eldeſt heir-female ſucceeding without diviſion; which failing, to James Gordon of Cobairdy, the eldeſt heir-female ſucceeding without diviſion; which failing, to certain other heirs.

Erneſt Leſlie died in 1740, without iſſue; and James Gordon of Cobairdy being ſerved heir of proviſion to him, in virtue of the ſettlement 1735, expede a charter, and was infeft, in 1740, and continued in poſſeſſion of the lands from that time. In bar of the action to have the above mentioned deed 1735 ſet aſide, as contrary to the reſtrictions to which Erneſt Leſlie was ſubject, it was *pleaded* for the defender, That the lands of Inch were never ſubject to the tailzie of the eſtate of Balquhain; the lands are conveyed to Count Patrick in liferent, and to George his ſon, and his heirs-male, in fee; which failing, to Patrick, Count Leſlie, his other heirs of tailze, ſpecified in deeds of tailzie already made, or to be made; and are therefore veſted in George, as unlimited proprietor, and ſubject to his free diſpoſal.

They are not affected by the tailzie 1692; for a tailzie of lands to be acquired

acquired is not a valid and effectual tailzie, ſince the requiſites of ſtatute 1685 cannot be complied with, as to lands which the tailzier might afterwards acquire. Though ſuch tailzies were valid, the lands of Inch cannot be affected by the irritant and reſolutive clauſes in the tailzie 1692, nor by the limitations in the ſettlement 1700, which only extend to the lands in the tailzie 1692; nor will reſtraints upon property, even in a queſtion with heirs, be carried further than the tailzier has thought proper to expreſs; June 17. 1747, Campbell, caſe of Carlowrie, 1749.

By the tailzie 1692, ſuch lands alone are tailzied as Count Leſlie ſhould happen to conqueſt, acquire, or ſucceed to, 'and which I ſhall 'not otherwiſe diſpoſe upon in my lifetime;' but the lands of Inch are taken directly to George, as a fee-ſimple, and the powers reſerved by his father are diſcharged in George Leſlie's contract of marriage in 1706, without mention of, or reference to, the tailzies 1692 or 1700; they therefore cannot fall under the clauſe of the tailzie 1692.

2*do*, Suppoſing the lands of Inch had been ſubject to the ſame fetters and limitations with the eſtate of Balquhain, they are free from ſuch fetters, and ſecure by preſcription. In 1699, the lands of Inch were conveyed to Patrick Count Leſlie in liferent, and his ſon George in fee, without conditions or limitations. Upon this diſpoſition a charter was expede, and infeftment followed the ſame year; and upon that title the lands have been poſſeſſed from that period downwards, by which the claim competent to the ſeveral heirs of entail is cut off by the negative preſcription, and the unlimited fee of the eſtate eſtabliſhed by the poſitive; *A.* 1617, *c.* 12.; July 10. 1739, Macdowal of Macherſton, caſe of Kinaldy; February 3. 1753, Douglas *contra* Lady Kirkneſs.

Though Erneſt Leſlie made up his titles to Balquhain by a ſpecial ſervice and infeftment, as heir under the tailzie 1700, it is no interruption of the right under which he poſſeſſed the lands of Inch, as he made up a ſeparate title to theſe lands by a ſeparate ſervice and infeftment; as heir under the infeftment 1699, his poſſeſſion upon which entitled him to compleat the preſcription that was begun in the perſon of his father.

As Count Leſlie did in his ſon's marriage-contract 1706, diſcharge and renounce his reſerved powers over the lands of Inch, from that time the right of George became indefeaſible, and the preſcription running from that period, was completed before interruption, by the action of Anthony Count Leſlie.

Anſwered for the purſuer: The marriage-contract 1679 did not deprive Count Leſlie of the power of laying his heir under the obligations contained in the after tailzies. When he acquired the lands of Inch in 1699, he did not take the right of theſe lands to his ſon George in fee, in implement of his obligations to him contained in the marriage-contract; but, *eſto* an obligation lay upon him in favour of George his ſon, that obligation was extinguiſhed by George his taking and poſſeſſing the eſtate of Balquhain, in virtue of his father's ſettlements.

When Count Leſlie, in 1699, purchaſed the lands of Inch, though the right was taken to his ſon in fee, and only in liferent to himſelf, yet that acquiſition muſt be conſidered as made by himſelf, and, therefore, as falling under the clauſe of the tailzie 1692 concerning lands to be conqueſt or acquired by him; and under the clauſe of the tailzie

1700,

1700, concerning lands that had then been conqueſt, or might thereafter be conqueſt by him. In conſequence of which, the ſeveral heirs ſucceeding to George are ſubject to the limitations contained in the tailzies.

The lands of Inch being ſubject to the limitations in the tailzie of Balquhain, there is nothing in the marriage-articles between George Leſlie and Margaret Elphinſton, that can import a diſcharge of the obligations by former deeds.

2. Neither the poſitive nor negative preſcription can avail the defender. The abſolute property of the lands of Inch having been eſtabliſhed in the perſon of Count Leſlie, or George his ſon, their heirs cannot acquire ſuch property by preſcription, ſince, independent of, and antecedent to, any preſcription, the ſame was fully in them.

The right claimed by the purſuer is not a right of property, but the performance of an obligation, which Erneſt Leſlie, being ſubjected to by the tailzies of the eſtate of Balquhain, could not by a gratuitous deed diſappoint.

Could an immunity from ſuch obligation be acquired by the poſitive preſcription, the poſſeſſion of the eſtate of Balquhain by George, upon the tailzies 1692 and 1700, and by Erneſt upon that of 1700, was an acknowledgement of the obligation upon the heirs, with regard to the lands of Inch, in virtue of that right by which they enjoyed the eſtate of Balquhain.

Preſcription could not run till after the death of Count Leſlie in 1709, who, by his right in 1699 to the lands of Inch, had full power over thoſe lands; and it was interrupted in 1746 by the proceſs of Anthony Count Leſlie.

The negative preſcription has not run, as no action could ariſe before the deed executed by Erneſt Leſlie, at leaſt before the death of Patrick Count Leſlie, who was not ſubject to the tailzie; and the poſſeſſion of the eſtate of Balquhain by the heirs in virtue of the tailzies, is an effectual interruption of ſuch preſcription.

'The Lords ſuſtained the defence, and aſſoilzied.'

P. C.

Act. *D. Graeme.* Alt. *M'Queen.* Reporter, *Auchinleck.* Clerk, *Pringle.*

No. LXXXIX. *February* 28. 1769.

ARCHIBALD DUFF of Drummuir,

Againſt

Mr ALEXANDER CHALMERS Miniſter of Cairney.

Whether preſbyteries may deſign moſs for the uſe of a miniſter?

THE miniſters of the pariſh of Cairney had, from time immemorial, enjoyed a ſervitude of caſting peats in certain moſſes, the property of the Duke of Gordon.

But, in 1767, the preſbytery, upon a petition from Mr Chalmers the incumbent, ſetting forth that thoſe moſſes were exhauſted, deſigned part of a moſs belonging to Mr Duff of Drummuir, for the uſe of the petitioner and his ſucceſſors, in all time coming.

This decree being brought under challenge by Mr Duff, it was *pleaded* for the miniſter, That the 165th act of parliament 1593, which directs the extent of glebes, provides, 'That the ſaids glebes be deſigned 'with freedom of foggage, paſtourage, fewall, faill, diffat, loning, free 'iſchue and entry, and all uthers priviledges and richtes, according to 'uſe and wont of auld.' And the act 1663, c. 21. enacts, 'That every 'miniſter have fewel, foggage, feal, and divots, according to the act of 'parliament made in *anno* 1593.'

Theſe ſtatutes are expreſs. The firſt ordains, that glebes be *deſigned* with freedom of fuel, &c. and the other, that *every* miniſter have that right. The power of deſignation is conferred upon preſbyteries, in words as clear as thoſe under which they are in the uninterrupted uſe of deſigning manſes and glebes. Nor can that deſignation be limited to thoſe pariſhes where the miniſter had already acquired a right of ſervitude by preſcription; for, why make a law to veſt in miniſters what they already enjoyed? or, why oblige preſbyteries to decree privileges already acquired? But, in whatever way the general point may be determined, the preſent decree of the preſbytery muſt be good, ſince it is confeſſed, that the miniſters of the pariſh of Cairney have been in the immemorial poſſeſſion of a ſervitude of fuel.

Anſwered for Mr Duff: The powers now aſſerted to belong to preſbyteries cannot be ſupported upon the ſtatute 1593. That ſtatute plainly refers to thoſe pariſhes where any, or all of the privileges therein mentioned had been acquired by preſcription; for if, independent of *uſe and wont of auld*, that is, of immemorial poſſeſſion, every miniſter could have demanded a deſignation of fuel, he muſt, upon the ſame principles, have been equally entitled to inſiſt for a deſignation of paſturage; but that this was not the caſe, is obvious from the ſubſequent

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ſtatute in 1663, paſſed many years after, and empowering preſbyteries to deſign graſs glebes, or paſturage for a horſe and two cows.

Upon the conſtruction of the ſtatute 1593, contended for by the miniſter, this laſt proviſion would have been ſuperfluous; and indeed, the ſame plea has been already over-ruled by the court in the caſe of the miniſter of St Martin's, *anno* 1763.

'The Lords found, that the preſbytery were incompetent judges, and 'that their decreee is *funditus* null and void.'

G. F.

For the Miniſter, *M'Queen.* Alt. *Lockhart.* Clerk, *Roſs.*

No. XC. *February* 28. 1769.

HERITORS of the Pariſh of Elgin,

Againſt

WILLIAM TROOP.

Miniſter of a royal borough with a landward pariſh not entitled to deſignation of a manſe upon the ſtatute 1663.

THE pariſh of Elgin, beſide the royal borough of that name, contains a large diſtrict to *landward.* The cure is ſerved by two miniſters, neither of whom, at leaſt ſince the revolution, have enjoyed either a manſe or a legal glebe.

In 1764, the preſbytery, after ſummoning the heritors, ordered eſtimates of the expence of a manſe, and contracted for the execution with William Troop maſon in Elgin, to whom they ordained the money to be paid by the heritors, according to the proportions at which, by the decree of deſignation, they had aſſeſſed their reſpective lands.

A charge given upon this ſentence being ſuſpended, it was *pleaded* for the heritors, That miniſters of royal boroughs have no title to inſiſt for deſignation of a manſe upon the ſtatute 1663.

In ſupport of this propoſition, it was obſerved, That, in the moſt antient periods of our church, the building and repairing of the manſe were burdens incumbent upon the churchmen themſelves. This appears from the 13th canon of a provincial council held in Scotland in the reign of Alexander II. *anno* 1249.

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In like manner, after the reformation, the act 1563. *c.* 72. provides that the popiſh parſon or vicar ſhall be obliged to yield up to the proteſtant miniſter ſerving the cure, 'the principal manſe, or ſa meikle 'thereof as ſall be fundin ſufficient for ſtaiking of them, or that an 'reaſonable and ſufficient houſe be bigged to them, beſide the kirk, be 'the perſon or vicar.' This proviſion is inforced by the 48th act of the parliament 1572, and by 1592, c. 118. extended even to ſuch abbays and cathedral kirks, 'quhair na uther manſe nor gleib, pertain-'ing to parſon or vicar was of before; ſwa that the miniſters preſently 'admitted, or quhilkis hereafter ſall happen to be admitted, to the office 'or cure of the miniſtry, within the ſaid kirk, ſall have an ſufficient 'manſe and dwelling place within the precinct of the abbay quhair he 'ſervis.'

From theſe ſtatutes it appears, that the burden of building manſes lay ſolely upon the eccleſiaſtics; nor is there the leaſt trace of any obligation impoſed, either upon the heritors, or upon the pariſhioners for that purpoſe. With regard to repairs, it is obvious, that they muſt have been a burden upon the incumbent, ſince no other perſon is made liable for the expence of them; and ſo this point is fixed by the after ſtatute, 1612, c. 8.

Thus matters ſtood from the earlieſt period of the Scottiſh church, down to the year 1644, when an act paſſed, whereby preſbyteries were empowered to deſign manſes and glebes out of kirklands, or, in default of them, out of temporal lands; *Borrowſtoun* kirks being always excepted.

This exception is taken away by a ſubſequent ſtatute, 1649. c. 45. which 'ordains the heritors of the pariſh, at the ſight of three mi-'niſters and three ruling elders, to be appointed by the preſbytery, to 'build competent manſes to their miniſters, the coſt and expence there-'of not exceeding L. 1000, and not being beneath 500 merks; and 'that burghs, and heritors of the landward parts of the pariſh provide 'alſo competent dwelling places and houſes for their miniſters, the 'ſum not being above or beneath the ſums above expreſſed.'

The two laſt mentioned ſtatutes fell under the general act reſciſſory 1661, and matters returned to the footing upon which they ſtood by 1612, and former enactments; and as, prior to the two reſcinded acts, there was no obligation upon the heritors to build manſes, it is clear, that, were this cauſe to be determined by thoſe antient ſtatutes, the miniſter of Elgin could not compell the heritors to build a manſe for him.

But the matter does not reſt here: The act 1663, *c.* 21. contains ſundry proviſions for the benefit of miniſters, and is declared, '*as to* '*the manſes*, to have force, as the ſame had been made and dated the '14th of March 1649.' It is plainly copied from the reſcinded act of that date: It is copied from it in ſo far as relates to miniſters of country pariſhes; but, with reſpect to miniſters in burghs, is entirely ſilent, and *ex propoſito* omits to renew the abrogated proviſion in their favour.

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As, in theſe circumſtances, the omiſſion cannot be conſidered as accidental, there is no room to doubt that the intention of the legiſlature was to exclude miniſters of royal boroughs from the benefit of manſes. And ſo it was expreſsly found in the caſe of the miniſter of Dunfermline, obſerved by Falconer, June 30. 1750.

Pleaded for the charger: The ſtatutes 1563, 1572, 1592, and 1594, are expreſſed in general terms, and neceſſarily import, that the miniſter of every pariſh, without diſtinction, was entitled to a manſe.

Before the reformation, the burden of building and repairing manſes lay upon the pariſhioners. The veneration in which the clergy were then held, was too great to require any poſitive enactment of the legiſlature, whoſe interpoſition indeed was in great meaſure rendered unneceſſary, by the almoſt unbounded juriſdiction enjoyed by the church, in every matter where the intereſt of her ſervants was concerned.

It appears from the books of aſſembly, that many of the firſt reformed miniſters had no larger allowance than L. 20 or L. 30 Scots; and 200 merks was among the higheſt ſtipends. Upon ſuch a pittance, it were abſurd to ſuppoſe, that the incumbents could have been ſubjected to the new obligation of building or repairing their manſes.

The introduction of Epiſcopacy, a favourite plan of James VI. was exceedingly diſagreeable to the nation in general. Among other expedients deviſed for reconciling them to that meaſure, the ſtatute 1612, *c.* 8. entitled, '*An act anent repairing of biſhops manſes*,' was paſſed; by it both heritors and pariſhioners were freed from the building or repairing of manſes, and the burden laid upon the incumbent himſelf.

It would appear, that this ſtatute had not long continued in obſervance, with reſpect to the inferior clergy at leaſt, if ever deſigned to extend to them; for, by a deciſion Feb. 11. 1631, miniſter of Inverkeithing againſt Ker, collected by Dury, it was found, That the miniſter 'might 'either deal with the pariſhioners for bigging a manſe to him, or *pur-* '*ſue them therefor*, prout de jure, or otherwiſe big his own manſe, 'the expence whereof would be refunded to his executors by the next 'incumbent, conform to the act of parliament.'

Be this as it will, as, prior to the act 1612, every miniſter, whether of a country pariſh, or of a royal borough, was entitled to a manſe, ſo no exception is contained in that ſtatute; and that *de facto*, poſterior to it, miniſters of royal boroughs did enjoy manſes, is clear from another deciſion, July 24. 1629, Nairn *contra* Boſwell.

That judgement, given in the caſe of a glebe, and *a fortiori* applicable to the caſe of a manſe, is ſupported by the act 1644. For ſince, in order to give an exemption to royal boroughs, the aid of a ſtatute was neceſſary, it follows, that, prior to that enactment, the miniſters of royal boroughs were *in pari caſu* with others. The exception however of *Borrowſtoun* kirks was ſoon recalled, and the antient common law, whereby all miniſters, without diſtinction, were entitled to have manſes built for them, reſtored by the ſtatute 1649. *c.* 45. Such being the caſe, the act reſciſſory made no variation in this reſpect, but, by aboliſhing both the late acts, did in effect leave matters in the ſame ſituation as if the ſtatute 1644 had never been enacted, or the ſtatute 1649 had continued unrepealed.

The former law, by which miniſters, even of royal boroughs, had right to manſes, being reſtored, there could be no occaſion for an expreſs enactment, to eſtabliſh that right upon as broad a foundation as it ſtood prior to the date of the reſcinded ſtatutes. The principal view of the act 1663 was to veſt in biſhops the juriſdiction formerly exerciſed by preſbyteries; and it would not be ſurprizing, though leſs attention had been paid to other accidental conſiderations. But, even in thoſe circumſtances, the act itſelf ſhows the intention of the legiſlature, that miniſters of royal boroughs, at leaſt in the caſe where there is a landward pariſh annexed, ſhould be entitled to manſes. For not only are the words general, and without exception, but, in relation to glebes, it is expreſsly provided, 'That, in all deſignations of glebes incorporate 'acres, in village or town where the heritor hath houſes and gardens, 'the ſame ſhall not be deſigned, *he always giving other lands neareſt to 'the kirk.*' Hence it follows, that miniſters of boroughs are entitled to have lands deſigned for a glebe; and, if ſo, they muſt have equal right to the leſſer benefit of a manſe.

The obligation of conſtant reſidence, is equally ſtrong upon the miniſters of royal boroughs as upon others; and although, from particular circumſtances, ſome of them may chance to enjoy larger ſtipends, their trouble muſt neceſſarily be increaſed with the greater number of their pariſhioners, and the expence of living muſt be more conſiderable.

Arguments taken from *Borrowſtoun kirks*, or pariſhes within boroughs, will not apply to the preſent caſe, where the pariſh is not confined to a borough, but conſiſts of a large diſtrict to landward, which happens to comprehend a borough within it. It would ſound ſtrangely to ſay, that by the erection of a borough in an extenſive pariſh, the miniſter, at the ſame time that he had his labour increaſed, ſhould forfeit one of his moſt valuable rights; and, in more caſes than one, miniſters of royal boroughs have been found entitled to manſes upon this very footing, that there was a landward pariſh annexed.

Replied for the heritors: The charger's whole argument proceeds upon the ſuppoſition, that, prior to the uſurpation, heritors were ſubjected, at common law, to the burden of building or repairing manſes. But this is a miſtake. It is true indeed, that the miniſters of certain boroughs have got right to manſes, by coming in place of the Popiſh clergy. Theſe may derive aſſiſtance from inveterate uſe, and to them the deciſions quoted muſt be referred. In the ſame manner might perhaps be explained the words of the ſtatute 1663, referred to by the charger, though, by the expreſſion of *villages* and *towns*, boroughs of regality or barony ought properly to be underſtood.

'The Lords determined the queſtion upon the point of law, and 'found, That the miniſter of Elgin was not entitled to inſiſt for the 'deſignation of a manſe, upon the ſtatute 1663.'

G. F.

For the Heritors, *Lockhart*, *W. Mackenzie*. *Geo. Wallace*. Reporter *Barjarg*. For the Charger, *David Dalrymple*,

No. XCI. *March* 1. 1769.

EARL of GLENCAIRN,

Againſt

The MAGISTRATES, &c. of Kilmarnock,

A baron feuing out his barony with baron-bailie powers, conveys no privilege to the vaſſal which is not ſpecially granted in the feu-right.

IN the year 1591, the village of Kilmarnock, by a charter under the great ſeal, was erected into a borough of barony in favour of the Earl of Kilmarnock; and, from that time down to 1695, the borough was managed by a baron-bailie nominated by the Earl of Kilmarnock, and afterwards by two bailies and nineteen counſellors.

In the year 1700, William Earl of Kilmarnock, for onerous conſiderations, diſponed, and, in 1705, ratified his diſpoſition of certain lands and tenements, with the whole common goods, cuſtoms, and privileges of the borough of barony of Kilmarnock, to and in favour of the then bailies and treaſurer of the ſaid borough, for themſelves, and in name and behalf of the council and community of the ſaid town; in which, after reſerving to himſelf the nomination of two bailies, regulating the mode of preſenting leets, and diveſting himſelf of ſeveral rights and privileges, he conveys 'power alſo to the ſaid bailies for the time, to 'chuſe a town-officer to ſerve the town for the time;' and alſo, 'power 'to the ſaid bailies to hold and affix courts within the bounds of the 'ſaid town, and to decide, determine, and cognoſce in all actions and 'cauſes, both civil and criminal, and to pronounce decreets, and to put 'the ſame to due and lawful execution,' &c. and generally, to 'do and 'act in every affair relative to the ſaid town, ſicklike, and as freely in 'all reſpects, as any other free borough of barony within this king-'dom.'

In a declarator by the Earl of Glencairn, as ſuperior of the town of Kilmarnock, to have it found and declared, that 'he has the ſole power 'and privilege of appointing proper perſons to exerciſe the offices of clerk 'and fiſcal, and others dependent on, and belonging to the borough of 'barony of Kilmarnock, excepting a town-officer, whom the ſaid bai-'lies and council are ſpecially authoriſed by their feu-rights to appoint.' The queſtion occurred in point of law, 'how far a baron, when he 'feus out his barony, in whole or in part, as a barony, or with baron-'bailie powers, gives the vaſſal right to hold courts for payment of his 'rent, and other matters falling within the juriſdiction of a barony, and 'to name clerks, officers, fiſcals, and Birlymen; or if the vaſſal has no 'right to name any of them, unleſs ſuch power is ſpecially granted in 'the feu-right?'

Pleaded

Pleaded for the Earl of Glencairn: That though a ſimple baron, infeft *cum curiis*, upon feuing out his barony, with baron-bailie powers to his vaſſals, ſhould, from ſuch act, be underſtood to communicate the right of holding courts for payment of rents, naming clerks, &c. yet a ſuperior, with a charter from the crown in his favour, erecting a certain diſtrict into a borough of barony, with the ſole power to him of naming bailies, and exerciſing the whole juriſdiction competent to a borough of barony, was not to be ſuppoſed, by granting *nominatim* one privilege, to have conveyed all other privileges, and the right of nomination to all other offices, except theſe only which he had expreſsly retained to himſelf.

The ſole, unlimited, and excluſive right of nomination to every office whatever within this borough of barony, was at firſt an inherent right in the family of Kilmarnock; nor is it poſſible to maintain, that by feuing out a ſmall part of the lands in the town, by creating bailies and council in this feu-charter, with juriſdiction over the whole town, and by conveying to them *nominatim* a right, that as ſuperior was inherent in himſelf, that of naming a town-officer, the Earl of Kilmarnock, by granting one privilege, muſt be underſtood to have transferred and conveyed, to theſe bailies and counſellors, every other right and privilege in his perſon.

The power of naming a town-officer being *nominatim* conveyed, affords the ſtrongeſt evidence, that the right of chuſing a clerk, or any other officer, was never intended to be conveyed; ſince it were altogether inconſiſtent to ſuppoſe, that the privilege of naming an inferior officer ſhould be expreſsly conveyed, while the right of nomination to a much higher office was to be conſidered as carried by implication. On the contrary, as the ſuperior had an undoubted right to reſerve to himſelf the right of nomination to every office in the borough, he has as effectually retained what he has not expreſsly given away, as if he had reſerved them in ſo many words.

Contended for the magiſtrates and council: That the borough having purchaſed their lands and franchiſes for onerous cauſes, have a title to every right formerly competent to the ſuperior, and not expreſsly excepted; as, where limitation was intended, it is clearly expreſſed. In a feu of lands, the ſuperior, *qua* ſuperior, has no right to minerals of any kind; theſe, unleſs ſpecially reſerved by the ſuperior in the grant, paſs to the vaſſal as part and pertinent of his property. So, in a feu of juriſdiction, juriſdiction being granted, every right neceſſary for expediting the ſame, muſt be conſidered as communicated and granted.

By the feudal law, when the king erects lands into a barony or higher dignity, the baron has thereby a juriſdiction, and a right to name all the officers of his court; and, if ſuch baron ſhall feu out the lands of his barony, it is held by Lord Stair and Craig, that the ſub-vaſſals, though they have not the *jus gladii*, have yet *diſtringendi poteſtatem*, a right inherent in property, and expreſsly eſtabliſhed by the old laws of Malcolm II. and David II. Stat. Malcolm. II. *cap.* 8. § 8.; and David II. *cap.* 17.

Had therefore the feudal grant to the town of Kilmarnock been ſimple, without an expreſs conveyance of juriſdiction, it would neceſſarily have carried a power to hold courts within their own land and heritage; and

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it is impoſſible to find out a principle to debar them from the nomination of all officers in their own proper court. But the grant is here much broader and more extenſive; it is a grant of courts and their iſſues, which has a clear and determined import in the law, and gives a proper juriſdiction over all thoſe within the territory. The extent of ſuch grant is clearly laid down by Craig. 'Cum curia conceduntur etiam officiarii, adjudicatores, et executores judiciorum, ſive eorum creandorum poteſtas; quia, conceſſo uno, ea omnia concedi videntur ſine quibus juriſdictio illa exerceri non poſſit;' Craig, *lib.* 2. *dieg.* 8. § 30. Theſe extend to all the *claves curiae*, as they are called by Balfour and Skene, and ſo to a lawful clerk, who ſhould inform the aſſize; for, as Lord Stair ſets forth, *b.* 2. *t.* 3. § 3. 'Such grant is a total exemption from the juriſdiction of the ſuperior.'

But not only from the legal import, but likewiſe from the intendment of the grants, and the analogy of law in ſimilar caſes, the bailies and council have the power of electing their own clerk and fiſcal, as they were not expreſsly reſerved by the ſuperior; for though, in the charter of no borough in Scotland, is there a right granted to elect a clerk and fiſcal, yet all and each of them have and exerciſe that privilege and power.

Even where no other right is granted but a proper juriſdiction, it is, by the principles of law, inherent in every court or juriſdiction, to nominate their own clerk and fiſcal. It holds univerſally in royal boroughs. It was ſo formerly with ſheriffs till the ſtatute of Robert III. § 23. The like power was competent to the commiſſary-court till act 1609. § 6. to juſtices of peace, till 1686, § 20. to the lion king at arms by 21. act 1672, and July 5. 1728, Lord Lion againſt Erſkine.

That every privilege is conveyed, which is not expreſsly reſerved, is clear from this, that notwithſtanding the limitations by ſtatute, of the powers inherent and competent to theſe courts, all of them, excepting the commiſſaries, further limited by 1609, do ſtill nominate and appoint their own fiſcal; and all of them, in caſe of death or deprivation of the clerk, do, *proprio et ordinario jure*, appoint a clerk, whoſe acts and deeds are legal and valid, till a nomination by thoſe having the ſtatutory right.

The reſervation by the granter clearly ſhows the intendment of conveying, with the juriſdiction, every ordinary and inherent right, except where it was expreſsly reſerved, and conſequently of giving the magiſtrates and council the nomination and election of their own clerk and fiſcal. It is the reſervation alone which gives right to the Earl of nominating two bailies; without it, he would have no power whatever of nomination or reſtriction, and, the community being free of that ſervitude, the council would have had the free and uncontrouled liberty of chuſing their magiſtrates.

'The Lords found, That the right of nomination of the clerk and 'fiſcal to the town of Kilmarnock, was in the Earl of Glencairn.

P. C.

Act. *Walt. Campbell.* Alt. *Rae.* Reporter *Auchinleck.* Clerk, *Gibſon.*

No. XCII. *March* 2. 1769.

Meſſrs AITON and Company Merchants in Glaſgow,

Againſt

HARRY CHEAP of Roſſie, and others, Executors of the deceaſed THOMAS CHEAP late Merchant in London.

Copartnery, if bound by a commiſſion executed after diſſolution by death of one of the partners, or given by one partner while ignorant of the death of the other?

THOMAS CHEAP had entered into a copartnery with Charles Adair merchant in London. Having been employed by the government as one of the commiſſaries in the expedition againſt Belleiſle, he died in that iſland, about the beginning of May 1761; and his death was publiſhed in the London news-papers of the 23d of that month.

Cheap and Adair were wont to correſpond with Meſſrs Aiton and company merchants in Glaſgow. From them, upon the 26th of March and 21ſt of May 1761, Mr Adair, the acting partner, ordered a quantity of lawns for the uſe of the company. Both commiſſions were duly anſwered; one parcel of the goods being ſent upon the 10th of June, the other upon the 22d of July following.

Adair ſtopped payment in May 1762. The repreſentatives of Cheap refuſed to hold thoſe commiſſions as a copartnery-concern, or to pay any part of the price of the goods; and an action was brought againſt them by Adair and Co.

Pleaded for the defenders: Society is extinguiſhed by the death of one, even of many partners; inſomuch that, by the civil law, '*Nemo poteſt ſocietatem haeredi ſuo ſic parere, ut ipſe haeres ſocius ſit*;' l. 35. D. pro ſocio. And, '*Adeo morte ſocii ſolvitur ſocietas, ut nec ab initio paciſci poſſimus ut haeres etiam ſuccedat ſocietati*;' L. 59. eod. Mandate likewiſe is extinguiſhed by the death of the mandant; *L.* 15. *C. Mandati.*

Theſe rules of the civil law being received with us, are deciſive of the queſtion; for the goods commiſſioned upon the 26th of March, during the ſubſiſtence of the copartnery, were not ſent from Glaſgow till the 10th of June, long after its diſſolution.

Anſwered for the purſuers: The principle, that the contract of ſociety, or of mandate, is diſſolved by death, reſpects not the queſtion in iſſue. In order to bind a company of merchants, there is no neceſſity that the commiſſion be executed during the copartnery. As ſoon as the commiſſion is given and accepted, an obligation ariſes, from which neither party can reſile; and that obligation muſt receive additional ſtrength, when the commiſſion is not only given, but begun to be executed. From that period, *res non eſt integra*; law and equity concur in giving effect to the contract.

Pleaded

Pleaded for the purſuers, 2*do*, The company is liable even for the goods commiſſioned upon the 21ſt of May, as being furniſhed in conſequence of a letter under the firm of the company, written by the one partner, before he had heard of the death of the other.

Even where the extinction of the ſociety by death is expreſsly ſtipulated, a contract will be valid, though entered into after the death of one of the partners, if before it had come to the knowledge of the parties-contractors. The contrary doctrine would be ruinous to commerce. It happens every day, that men of fortune enter into copartneries with men of little or no fortune, merely upon account of their ſkill in their profeſſion. With theſe is entruſted the management of the company's buſineſs, and they are ſent to ſettle perhaps in the moſt diſtant quarters of the globe, in order to conduct it to greater advantage. Merchants contract with perſons of this kind entirely upon the credit of the company. But an end would be put to all ſuch dealings, were it held to be law, that contracts of this nature ceaſe to be obligatory upon the company, from the very moment of the death of one of the partners happening in a remote place, and neceſſarily unknown to the parties-contractors.

'*Quod ſi, integris omnibus manentibus*,' ſays Paulus, L. 65. § 10. D. pro ſocio, '*alter deceſſerit, deinde tunc ſequatur res de qua ſocietatem coi-*
'*erunt, tunc eadem diſtinctione utemur qua in mandato: Ut ſi quidem*
'*ignota fuerit mors alterius, valeat ſocietas; ſi nota, non valeat.*'

This diſtinction is founded in reaſon. The partner contracting cannot take advantage of the intermediate death of the other, and thereby appropriate to himſelf the whole profits of a lucrative bargain; he muſt be accountable to the repreſentatives of his partner; and conſequently they muſt be accountable to him, and to the perſons with whom he contracted in the name of the company.

Anſwered for the defenders: This contract of copartnery contained no ſpecial clauſe; it muſt therefore be regulated by the common rules of law, and held to be diſſolved by the death of one of the partners. The commiſſion of the 21ſt of May was given after that diſſolution; nay, it was executed after Cheap's death was known in Scotland, and in particular known to the purſuers. The bargain, therefore, was null *ab initio*; in ſtrict law it was ineffectual; and, though perhaps the purſuers might have had ſome claim in equity, had they fulfilled it *bona fide*, in the belief that the ſociety ſtill ſubſiſted, there can be no room for any plea of that ſort here. Aiton and Co. knew the ſtate of the caſe; and yet they proceeded to execute the commiſſion.

This argument is the ſtronger, that the invoice of the goods, as well as a letter ſent along with them, was addreſſed, not to Adair and Cheap, but to Adair ſingly. Hence, it is apparent, *quo animo* the goods were ſent to London; the purſuers were ſenſible that Adair, not the company, was liable for them.

'The Lords found, That the company was bound by both commiſ-
'ſions.'

G. F.

Act. *M'Queen.* Alt. *Lockhart, Rae.*

No. XCIII.

No. XCIII. *March* 2. 1769.

JAMES SCRIMGEOUR and SON,

Againſt

Meſſrs WILLIAM ALEXANDER and SONS.

Powers of a ſhip-maſter.

WILLIAM ALEXANDER and Sons having freighted a veſſel from James Scrimgeour and Son merchants in Borrowſtounneſs, for Grenada in the Weſt Indies, it happened that, by the time of her arrival there, the whole ſugars in the iſland had already been put on board other ſhips, and that none was to be had for her loading. In this emergency, by the advice of Meſſrs Alexanders correſpondent, the maſter ſailed for Cape Fear, in North Carolina, in order to take in a cargo of tar; but was for ſome time detained by the diſturbances which had happened upon occaſion of the ſtamp-act.

In a reduction of a decree of the judge of the high court of admiralty, finding the freighters not liable in demurrage, on account of that detention, it was *pleaded* for the owners, That, whatever powers of adminiſtration the maſter might have in the courſe of a voyage, authoriſed by them, he was not entitled to alter the deſtination of the ſhip, more than he would be to navigate her all over the globe, without their knowledge or conſent. That, by preſuming to change the voyage fixed by charter-party, he brought upon himſelf the riſk of every damage, how accidental ſoever, the ſhip might ſuſtain in the courſe of that deviation; but that he had taken care to avoid this obligation, and thrown it upon the defenders, by taking their correſpondent bound 'to come between 'him and all damages whatever, in conſequence of going to Caro-'lina.'

Anſwered for the defenders: The powers of maſters of ſhips are aſcertained, not by ſtatute, but by the common law of merchants. They are entitled to freight the ſhip in foreign parts, without orders; to borrow money for her uſe; nay, even to impignorate her for payment of it: *Laws of Oleron*, art. 1. *Laws of Wiſby*, art. 35. By the civil law, the maſter was conſidered as coming in place of the owners, who were bound by his contract. And, by the practice of modern nations, the powers of the maſter are ſtill more extenſive; *Voet, de exercit. act. num.* 3.

As, therefore, the deviation in the preſent caſe exceeded not the maſter's power, ſo it was a well judged meaſure; and unforeſeen accidents cannot alter the eſtabliſhed rule, that the ſhip muſt bear her own loſs, and the proprietor of the cargo his: See *Ordonn. de Louis* XIV. *tit. Charter-parties, art.* 8.

Neither

Neither is the obligation granted by the defenders correſpondent in the Grenades ſufficient to put this caſe out of the common rule. *Arreſts, reſtraints, and detainments of all kings, princes, and people,* are part of the dangers expreſsly provided againſt by a policy of inſurance; but this obligation, being deſtitute of the neceſſary ſolemnities, cannot be equivalent to a policy. The only meaning of it was, to make the maſter eaſy, by promiſing to indemnify him, in caſe the run to Cape Fear ſhould be found to have been an irrational or improper ſtep.

The Lords found, 'That the maſter had no power to alter 'the deſtination of the ſhip, or undertake a new voyage; and, 'therefore, found the defenders liable for the delay which happen-'ed in conſequence of the run to Carolina.'

G. F.

Act. *Lockhart, Solicitor Dundas.* Alt. *Maclaurin, W. Craig.*

No. XCIV. *March* 7. 1769.

ROBERT RUTHERFOORD,

Againſt

WILLIAM and THOMAS BELLS, Children of William Bell, and ELIZABETH and JOHN MURRAYS his Grandchildren.

An adjudication ſuſtained as a ſecurity, notwithſtanding a pluris petitio.

WILLIAM BELL wine-cooper in Leith was creditor to Thomas Rutherfoord baker in Edinburgh, his father-in-law, in L. 314 : 15 : 10 Sterling.

He conveyed the debt to Elizabeth Rutherfoord his ſpouſe, in liferent, and as truſtee for behoof of their children, with a power of diviſion as ſhe ſhould think fit.

In leading an adjudication *cognitionis cauſa*, againſt Robert Rutherfoord, heir of Thomas, Elizabeth Rutherfoord neglected to deduct the rents of certain tenements which ſhe had poſſeſſed for ſome time, in virtue of an heritable bond of corrobo-ation granted in ſecurity of the debt.

Robert Rutherfoord inſiſted in a reduction, upon this ground, among others, that there was a manifeſt *pluris petitio*, ſufficient to ſet aſide the adjudication altogether.

Pleaded for the defenders: There was, properly ſpeaking, no *pluris petitio* in this caſe; for the payments of intereſt, by intromiſſion with the rents, were not made till after the date of the ſummons, and the

whole objection amounted to this, that, in taking decree, an old paralytic woman had neglected to inſtruct her man of buſineſs to deduct a ſmall ſum which ſhe had received. In ſuch circumſtances, to reduce the adjudication *in totum*, or to inflict any farther puniſhment than ſtriking off the penalties, or perhaps the accumulations likewiſe, was contrary to the practice of the court, even during a period when the rigour of law, and ſtrict adherence to form, were carried to a length inconſiſtent with the more enlarged ideas of the preſent age; *Vide Dict. voce* Adjudication and Appriſing.

In a caſe, abridged under that head, where a queſtion occurred between the debtor and an aſſignee, notwithſtanding a *pluris petitio* ariſing from payments made to the cedent, the adjudication was ſuſtained for the principal ſum and annualrents accumulated at the date of the adjudication, and annualrents thereof, and for neceſſary charges; becauſe though, in ſtrict law, the objection was ſufficient to ſtrike off all accumulations, yet, where the queſtion was with the debtor, and not with competing creditors, the practice had for a long time run the other way; 3d November 1738, Balfour againſt Wilkieſon.

This practice is founded upon principles. Juſtice is ſatisfied, if the wrong be redreſſed; and a much greater wrong would enſue, were the effect of an undeſigned error, in a trifling ſum, to ſet aſide the diligence, and forfeit the debt. Indeed, whatever advantage might be taken of an error in point of form, in favour of competing creditors, the ſame indulgence is not due to the debtor himſelf. If the penalties be ſtruck off, or in ſome caſes the accumulations alſo, he has gained enough; but a caſe can hardly be imagined, where it would be juſt to go a greater length.

Anſwered for the purſuer: In certain favourable caſes, a *pluris petitio* has not been ſuſtained to its full effect; as, where an adjudication had been led for a trifle too much, and where the miſtake had been occaſioned by a payment at a great diſtance of time, which did not conſiſt with the knowledge of the purſuer, an aſſignee, perhaps, or a truſtee. But the caſe is very different here, where decree has been taken for the whole ſum originally due, without giving credit for conſiderable recent payments made to the purſuer herſelf, and vouched by her diſcharge. Neither was this a mere overſight. In the courſe of the action, the purſuer repeatedly and poſitively denied, that any partial payment whatever had been made; nor did ſhe depart from that denial, till driven from it by production of her own diſcharge.

Lord Bankton, III. 2. 75. ſays, 'If the adjudication is eſſentially de-'fective, or led for more than was due by the party to whom the partial 'payment was made, it will be wholly annulled.' And his opinion is ſupported by an after judgment, in the queſtion between Roſe of Kilravock and Roſe of Clava, where an adjudication was *funditus* reduced upon a very inconſiderable *pluris petitio*.

'The Lords ſuſtained the adjudication as a ſecurity for principal ſum, 'annualrents, and neceſſary expences, accumulated at the date of 'the adjudication.'

G. F.

Act. *Nairne*. Alt. *Swinton*, jun. Clerk, *Roſs*.

No. XCV.

No. XCV. *March* 7. 1769.

THOMAS PEAT,

Againſt

ELIZABETH BEG, *Relict of James Johnſton.*

After ſummons of ranking and ſale, can a diſpoſition be granted by the bankrupt in implement of a minute prior to it?

JOHN CLYDE maſon in Douglas, in 1741, granted an heritable bond for 1200 merks, upon his lands of Croſsburn, to George Forreſt, and infeftment was taken.

Theſe lands being ſold by public roup, in 1754, William Howiſon writer in Douglas, as principal, with John Young and William Lorimer, as cautioners, granted their joint bond for the price.

In 1757, John Clyde became notour bankrupt. Decree of adjudication of the lands of Croſsburn, and others belonging to John Clyde, was obtained, for the accumulated ſum of L. 144 Sterling, due upon the bond, in 1762; and a ſummons of ranking and ſale raiſed in 1764.

Upon the narrative of the roup of the lands of Croſsburn, that William Howiſon had acted as truſtee for Young and Lorimer, and that they had inſiſted in a proceſs for implement, in 1765, Clyde granted them a diſpoſition of the lands, which, being infeft, they diſponed to Elizabeth Beg, who, in like manner, took infeftment, in 1767.

Thomas Peat ſucceeded to an heritable bond for L. 30, affecting the ſame lands of Croſsburn in 1761, compleated by infeftment, and on which adjudication had proceeded, in 1764. And having likewiſe obtained right to the ſum contained in the former bond and adjudication, went on in the ranking and ſale.

Elizabeth Beg brought a multiple-poinding in name of the tenants, which being remitted to the ranking, ſhe inſiſted, that the lands of Croſsburn, her abſolute property, ought to be ſtruck out of the ſale, and the creditors ranked upon the price in her hands.

It was *pleaded* for her, That though, after a proceſs of ranking and ſale is commenced, it is not in the power of the debtor, by a voluntary deed, to withdraw any part of his eſtate from the diligence of his creditors, the rule does not apply here. For as, ſince the date of the roup 1754, the common debtor was under a ſpecific obligation to diſpone to the purchaſer, the diſpoſition 1765 was not a voluntary deed, but neceſſary, and ſuch as he could have been compelled to grant.

A proceſs of ranking and ſale cannot have a ſtronger effect in this queſtion, than an inhibition againſt the common debtor; yet an inhibition poſterior to the roup 1754, would have afforded no objection againſt the

the diſpoſition upon which the petitioner founds her claim of having the lands of Croſsburn ſtruck out of the ſale.

Nor is the diſpoſition affected by Clyde's prior bankruptcy. The ſtatutes 1621 and 1696 do not hinder a bankrupt, not interpelled by prior diligence, from ſelling his ſubjects at an adequate price; and, if ſo, much leſs can they be interpreted to prevent him from implementing a ſale formerly made, and granting a diſpoſition in conſequence of a prior obligation. Similar to this is the caſe of an apparent heir who, after granting infeftments of annualrent, gave procuratory for ſerving himſelf heir, that his infeftment might accreſce to the annualrent-rights. It was objected for poſterior adjudgers, That the heir was bankrupt at the time; but the Lords preferred the annualrenters; February 1728, Creditors of Graitney competing.

Anſwered for the purſuer: Even though the defender's authors had taken the proper ſteps for compleating their right before the adjudications were led, the lands of Croſsburn muſt ſtill have been burdened with the bond for 1200 merks, upon which infeftment had followed, ſo far back as the 1754. But, as matters now ſtand, theſe lands cannot be ſtruck out of the ſale, becauſe the proceſs was commenced before the date of the diſpoſition, and Clyde was bankrupt when he granted it.

A ſale differs from an inhibition. The latter perhaps excludes only voluntary deeds; but, in the former, it is an eſtabliſhed maxim, *pendente lite, nihil innovandum*; no diligence begun, or even completed after its commencement, can have the effect to alter the preference of the creditors. Nor is the diſtinction of deeds neceſſary or voluntary founded in the bankrupt-acts. This is plain from the ſtatute 1621, and Lord Bankton, in expreſs terms, ſays, I. 10. 104. that 'it is extended to deeds that appear 'to be neceſſary,' which he exemplifies by a caſe ſimilar to the preſent.

The Lords, moved principally by the latency of the roup, 'Refuſed 'to ſtrike the lands out of the ſale.'

G. F.

Act. *Wight*. Alt. *Macqueen*.

No. XCVI. *March* 7. 1769.

MARGARET, ELIZABETH, AGNES, and ISOBELL GARRIOCHS,

Againſt

Mr ROBERT KENNEDY.

Stillicide.

THE Lords refuſed a petition, reclaiming againſt an interlocutor of the Ordinary upon the bills, refuſing a bill of advocation of a decree

decree of the dean of guild of Edinburgh, by which it had been found, that, though 18 inches muſt be left free between two buildings in borough, where there are two eave-drops, yet, where the new building is ſo conſtructed, as that there is but one eave-drop, 9 inches are ſufficient.

This rule, it was obſerved upon the bench, is not founded in written law, but upon general cuſtom.

G. F.

Act. *W. Baillie.* Alt. *A. Fergusſon.* Clerk, *Kilpatrick.*

No. XCVII. *March* 10. 1769.

MARION RUSSEL,

Againſt

JAMES RUSSEL of Aſtieſteel.

Bond of proviſion containing heirs and aſſignees, *if it fall by predeceaſe of the grantee.*

WILLIAM RUSSEL, late of Aſtieſteel, granted a bond of proviſion in favour of David, his ſecond ſon, his *heirs*, *executors*, and *aſſignees*, payable at the firſt term after the death of the granter.

David Ruſſel having predeceaſed his father, an action was brought by his ſiſter Marion, for payment of the bond.

Pleaded for the purſuer: Though, in the general caſe, legacies and donations *mortis cauſa* expire *morte donatarii*, the donor being preſumed to prefer his own heirs to thoſe of the donee, yet the preſumption may be taken off by any clear indication of a different intention; and a clearer indication can ſcarce be, than what occurs here, where the bond is expreſsly taken to heirs and aſſignees. Thus it was found in the caſe of a legacy, July 16. 1760, Inglis *contra* Millar. And the preſent queſtion concerning a donation *mortis cauſa*, muſt be determined by the ſame rule. Nor can it be objected, that the bond never was *in bonis* of David, and therefore cannot be taken up by his repreſentatives; for the purſuer takes, not as repreſentative of David, but as conditional inſtitute, deſigned and pointed out under the denomination of his heir or executor.

Anſwered for the defender: The arguments drawn from legacies cannot apply to the preſent caſe, to a bond of proviſion by a father to his child. Bonds of proviſion are granted in implement of the natural obligation; and, as ſoon as that ceaſeth by the death of the child, they are underſtood to fall; ſo it was decided in the caſe, Bell *contra* Davidſon, January 14. 1730, and in a ſtill later caſe, November

17. 1757, Gordon *contra* Roſs, even with regard to a bond of proviſion granted by a grandfather.

This general rule of law may no doubt be excluded, if, by fixing a *certain* term of payment, or by any other means, the father's intention clearly appear, that the bond of proviſion ſhall be good, notwithſtanding the predeceaſe of the child. But the bare adjection of heirs and aſſignees will not have the effect. That clauſe is, for moſt part, inſerted in bonds of proviſion, that, in the event of the exiſtence of the implied condition, the bond may deſcend to heirs or aſſignees; but it would be hard, if, after the death of the father, the extraneous heirs of the children were allowed to claim bonds, which, upon their predeceaſe, he had omitted to cancell. Legacies have no certain deſtination, and, when bequeathed to heirs and aſſignees, may be ſuſtained even in their favour; but the ſtronger preſumption, which obtains in the caſe of bonds of proviſion, is not removed without ſome clear and explicit indication of the donor's will.'

'The Lords ſuſtained the defence and aſſoilzied.'

G. F.

Act. *Macqueen.* Alt. *Lockhart.* Reporter *Pitfour.*

No. XCVIII. *March* 10. 1769.

JAMES BRUCE Multurer of the Mills of Alloa,

Againſt

ROBERT STEIN, and others, Brewers in Alloa.

Thirlage acquired by preſcription, upon a grant of the mill and pertinents.

CHARLES Earl of Mar, in 1677, obtained a charter under the great ſeal of the lordſhip, barony, and regality of Alloa, *with the mill and pertinents thereof*; and another charter of like nature, and containing the ſame clauſes, was afterwards expede by his ſucceſſor John Earl of Mar, in 1699.

Theſe lands having come into the perſon of Lady Frances Erſkine, an action of abſtracted multures was brought by the tackſman of the mill againſt Robert Stein, and other brewers in Alloa, before the court of the barony.

The cauſe having been advocated by the defenders, it came out, upon evidence, that, for more than forty years, the brewers of Alloa had been in the uſe of grinding their malt at the mill of the barony, and of paying inſucken multures; that ſundry decrees had, in the courſe of that time, been recovered againſt the feuers for abſtractions; that they had been in uſe of performing mill-ſervices.

Pleaded

Pleaded for the defenders: Except in the caſe of mills of the King's property, or thoſe belonging to churchmen, the mere uſe of grinding is not ſufficient to eſtabliſh an aſtriction; and the clauſe of *the mill and pertinents*, contained in the charters, can import no more than a conveyance of whatever thirlage might have been, *ab ante*, impoſed.

The feu-charters granted in favour of the vaſſals uniformly bear the *reddendo* of a particular duty, *pro omni alio onere:* Which clauſe, however little it may imply liberation from a prior aſtriction, will at leaſt be a ſtrong circumſtance to ſhow, that it was not the intention of parties to introduce a ſubſequent thirlage.

Anſwered for the purſuer: It is a point agreed by all our lawyers, that payment of dry multure continued for more than forty years, is, *per ſe*, ſufficient to eſtabliſh a thirlage, ſince ſuch uſe of payment cannot be explained but upon the footing of a ſervitude.

Payment of intown-multures continued for the ſame period, muſt receive the like conſtruction; more particularly, where the lands of a barony are the ſervient tenement, and the mill of the barony the dominant; for ſuch and ſo intimate is the connection of the lands of the barony with the mill of the barony, that the ſervitude is underſtood to have been actually reſerved, unleſs the vaſſal have taken care to obtain an expreſs immunity from it.

In this argument, the purſuer is ſupported by the opinion of Lord Bankton, which is confirmed by an after deciſion in the caſe of the Earl of Hopetoun againſt the feuers of Bathgate, 21ſt November 1753. Nor can any ſolid objection be founded upon the clauſe, *pro omni alio onere*, in the charters of ſome of the vaſſals, confined as it is, by the ſenſe of the court and the reaſon of the thing, to the feu-duty, nor ever extended farther.

The Lords, moved, not ſo much by the uſe of coming to the mill, which might have ariſen from motives of conveniency, as by the decrees which had been taken in the baron-court for abſtractions, and the preſumption in favour of the mill of a barony, found, 'That the 'defenders are aſtricted to the mills of Alloa, and that they cannot 'erect ſteel-mills within the thirle.'

G. F.

Act. *M'Queen.* Alt. *Lockhart* and *M'Laurin.* Reporter, *Monboddo.*
Clerk, *Kirkpatrick.*

No.

No. CXIX. *June* 15. 1769.

The MAGISTRATES *and* TOWN-COUNCIL *of Culroſs,*

Againſt

The EARL *of* DUNDONALD, *and other Truſtees for* CHARLES COCHRAN *of Culroſs.*

Wreck and Ware.

BY a charter dated 5th June 1592, the town of Culroſs was erected into a royal borough, and certain lands were granted by the crown, 'cum omnibus et ſingulis domibus, aedificiis, tenementis, &c. *ſalinis*, '*ſalinariis*, *ſive ſalis patellis*, aliiſque infra limites ſeu bondas ſupra-'ſcriptis, jacen. videlicet, inter terras de Valyfield ex orientali, terras 'vocat. *Vallis de Caſtlehill* ex occidentali, terras *Blairhall* vocat. et com-'munem moram dicti burgi ex boreali, *et mare ex auſtrali*, *parti-*'*bus*.' A particular enumeration of the different obventions and profits which could be ſuppoſed to ariſe from them, was contained in the charter, in theſe words: 'Una cum annuis proficuis et com-'moditatibus, firmis, feudifirmariis, annuis redditibus, introituum 'proficuis et divoriis, aliiſque commoditatibus dicti burgi, terrarum, te-'nementorum, &c. vaſtorum, ſalinarum, et ſuis pertinen. &c. cum om-'nibus aliis et ſingulis libertatibus, commoditatibus, proficuis, et aſia-'mentis, ac juſtis ſuis pertinentibus quibuſcunque, tam non nominatis, 'quam nominatis, tam ſubtus terram, quam ſupra terram,' &c.

On this charter, the purſuers brought a proceſs of declarator of their full and excluſive right, not only to the lands contained in their charter, but alſo to the ſea-ſhore oppoſite thereto, together with the wreck, ware, and other ſea-weeds within the ſea-mark, and the cutting, burning, and diſpoſing of the ſame; and *contended*, That the boundary therein ſpecified, being *by the ſea on the ſouth part*, muſt, from the nature of the thing, include the *littus maris*, and every uſe and profit which could be made of it, either at high or low water, particularly that of cutting ſea-ware, which grows, or is thrown in upon the ſhore of theſe lands.

On the other hand, the defenders founded upon a charter dated 6th June 1663, by which 'all the lands lying within the ſea-mark, from the 'lands of Caſtlehill, on the weſt ſide of the borough of Culroſs, to the 'Newmiln-bridge on the eaſt ſide thereof,' were granted to the Earl of Kincardine; and, as the charter comprehended the whole ſhore adjacent to the lands contained in the charter to the town of Culroſs, and had been veſted in them by indiſputable progreſs, they likewiſe *pleaded*

a right to all the wreck, ware, and other ſea-weeds upon theſe ſhores.

Pleaded for the purſuers: The grant founded on by the defenders being near an hundred years poſterior to the purſuer's charter, could not convey what the crown was before diveſted of; neither does it contain any words, or expreſs grant, of wreck and ware, on which to found the right contended for.

2. The grant was itſelf improper and inept, ſeeing a grant of the ſea-ſhore, ſeparate from, or independent of, the lands to which it is adjacent, is a thing unknown in our law, and what the crown could not give; eſpecially after having already given the lands adjoining to ſuch ſhore to another, and expreſſed the boundary thereof to be by the ſea.

3. The defenders have not pretended that poſſeſſion ever followed upon their charter, or that they, or their authors, did at any time exerciſe, or ſo much as claim the right or privilege of cutting or gathering the ſea-ware upon the ſhore in queſtion.

By the Roman law, the *littora maris* were held to be *res nullius*, and could not be appropriated to any private perſon; they were *extra commercium, et juris publici*. The ſea-ſhore is, by all our lawyers, enumerated among things common, which belong in property to none; and it is diſtinguiſhed from things public, which belong in property to the ſovereign power. By the law of Scotland, theſe are reckoned *inter regalia*; but under that denomination ſea-ſhores never were comprehended, or held proper to be made the ſubject of a ſeparate grant by the crown, independent of the lands to which they are adjacent. Upon theſe principles, the court found, 25th November 1714, Bruce *contra* Raſhiehill, that ſea-greens were not *inter regalia*, and that they were not eſtabliſhed by a charter from the crown as a feu or right ſeparate from the lands.

But, although the ſea-ſhores cannot become the private property of any one, ſo as to exclude the public and neceſſary uſe of them, yet, on the other hand, the right of a private perſon may be ſo far eſtabliſhed in them, that a grant of the ſea-ſhore, along with the lands to which it adjoins, or of the caſual profits ariſing therefrom, ſuch as the cutting or gathering of ware, may be proper and valid in a charter from the crown; and, upon poſſeſſion following thereon, will be effectual for ſecuring an excluſive privilege of exerciſing ſuch right, as connected with, and dependent on, the adjacent grounds.

The boundary mentioned in the purſuers charter is not *littus maris*, or ſea-ſhore, but *mare ex auſtrali parte*, or the ſea on the ſouth part, by which the *littus maris* is included. The diſtinction betwixt *mare* and *littus maris* is obvious. *Mare*, or the ſea, ſignifies the fluctuating element of water, *cui littora ſubjiciuntur, et ab eo quotidianis acceſſibus occupantur*. And *littus* is defined to be *terra vel arena quae ſubjacet mari, quatenus hybernus fluctus maximus excurrit*. A boundary, therefore, by the ſea, follows its *fluctus* and *refluctus*, and includes the *littus* or *terra vel arena quae ſubjacet mari*, and from which the water from time to time recedes. So that the uſes and profits which can be made conſiſtently with the public and common uſe of ſuch *terra* and *arena* during the

receſs of the water, belongs to the proprietor of the adjacent lands bounded by the ſea; and ſuch particularly is the right of cutting ſea-ware. The property, therefore, of the ſhore did not remain with the crown after the charter granted to the purſuers; but was, ſo far as the crown could convey it conſiſtently with the public good, plainly included in that grant, as was alſo every profit which could be derived therefrom. In fine, the words in the town's charter, which recites the particulars meant to be comprehended within the bounds deſcribed, mentioning expreſsly *ſalinis*, *ſalinariis*, *ſeu ſalis patellis*, which are undoubtedly within the ſea-mark, or *littus maris*, are fully ſufficient to remove every doubt.

Pleaded for the defenders: That the priority of the charter to the town of Culroſs, cannot affect their charter, if it ſhall appear, that what is granted by the one charter, is totally diſtinct and ſeparate from what is granted by the other.

The charter to the town of Culroſs contains only a grant of lands properly ſo called, without any mention of a ſhore, or any emoluments thence ariſing, as is uſual in every charter, when the ſea-ſhore is intended to be included; but theſe lands are expreſsly bounded *per mare ex auſtrali parte*.

The diſtinction made by the purſuers between *mare* and *littus maris*, is equally nice and fallacious. *Littus maris* is the boundary of the ſea; and when lands are ſaid to be bounded by the ſea, they are to be underſtood as bounded by the *littus maris*, which is defined in the civil law to be '*Quatenus hybernus fluctus maximus excurrit*;' and therefore a right to lands bounded by the ſea, can reach no farther than to the utmoſt verge of the ſhore on which the winter-tide flows.

The charter to the Earl of Kincardine expreſsly conveys the lands *within the ſea-mark*; and though it does not contain an expreſs grant of wreck, and ſea-ware, yet as the bounds therein mentioned comprehend the whole of the ſhore adjacent to the lands contained in the charter to the town of Culroſs, it muſt be underſtood to comprehend a right to the ſea-weed, and every other profit ariſing from a right to ſuch a ſubject as a ſea-ſhore, or land within the ſea-mark.

2. Although a ſubject may in ſome reſpects be underſtood as *inter res communes*, yet that it is nevertheleſs capable of property, is a doctrine laid down by *Lord Stair*, *B.* 2. *T.* 1. § 5. and as the lands within the ſea-mark, or *littus maris*, may be underſtood by the feudal maxims to be *inter regalia*, for *quae nullius ſunt*, *ſunt domini regis*, the king may, conſiſtently with public uſe and policy, alienate them, to the effect that the grantee ſhall reap any benefit that may accrue from their being underſtood to be his property, ſubſervient nevertheleſs to the common uſes of mankind. As, therefore, in the grant to the town of Culroſs, no mention is made of the ſea-ſhore, or any advantages proper thereto; as the lands of the town of Culroſs are bounded by the ſea, of which the boundary is *quatenus hybernus fluctus maximus excurrit*; as the benefit accruing by ſea-ware, or other caſual advantages, ariſing from the poſſeſſion of the ſhore, is not granted to the purſuers, and as the defenders, by the charter 1663, under which they claim, have an expreſs grant of *the lands within the ſea-mark*; they muſt of conſequence be underſtood

to

to have a right to the wreck and ſea-ware, as the fruit and produce of theſe lands.

'The Lords found, that the purſuers have right to the whole wreck 'and ware, and other ſea-weeds within the ſea-mark oppoſite to 'their lands, and of cutting and burning the ſame into kelp.'

P. C.

Act. *G. Halden.* Alt. *Ja. Boſwell.* Reporter *Lord Juſtice Clerk.* Clerk *Gibſon.*

No. C. *June* 22. 1769.

Sir JOHN GORDON of Invergordon, Bart.

Againſt

WILLIAM FORSYTH.

Acting as a commiſſioner of ſupply without a legal qualification. Colluſive proceſs for recovering penalties.

MR Forſyth was purſued for acting without a legal qualification as a commiſſioner of ſupply in the county of Cromarty.

It was *urged* for the defender, that he was duly qualified to act as a commiſſioner of ſupply at all the meetings held poſterior to the 21ſt May 1765; that he had paid the penalty in which he had been found liable by the ſheriff of Cromarty for acting on the 30th of April preceding; and that having been aſſoilzied by him as to ſubſequent actings, he was entitled to plead the *exceptio rei judicatae.*

The Lords, 18th December 1765, 'repelled the defence founded on 'the decreet of the ſheriff of Cromarty, ſuſtained the objection to the 'qualification of William Forſyth as commiſſioner, and found Sir John 'Gordon entitled to recover from him the penalty contained in the act 'of parliament for each of the times he acted as commiſſioner of ſupply 'without being duly qualified.' And, on the 15th February 1766, the court found it 'relevant for Sir John Gordon to plead colluſion againſt 'the decreet of the ſheriff of Cromarty, and allowed a proof,' &c.

The proof of colluſion was founded on Mr Forſyth's having acted as commiſſioner from ſolicitation, and contrary to his ſentiments, on the proceſs for recovering the penalty, having been brought by Mr Frazer of Ardochy, a perſon confederated with the defender, on the expences having been defrayed by Mr Pultney, and not by Mr Forſyth, and, on a receipt from the miniſter and elder, of their having received actual payment of twenty pounds Sterling for the poor of the pariſh, when, at the time of ſigning it, they had not received a farthing.

The purſuer *contended*, That, if the proſecution was not brought for the ſerious purpoſe of recovering penalties, if it was intended as a de-

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fence againſt an action to be brought at the inſtance of a real purſuer, the whole tranſaction muſt be colluſive, and the penalty decerned for deviſed for the purpoſe of ſcreening the defender.

To qualify a perſon to act as a commiſſioner of ſupply within any county or ſtewartry in Scotland, and to protect him from the penalties, he muſt, by act 5th Geo. III. 'be infeft in ſuperiority or property, or 'in poſſeſſion of lands in ſuch county or ſtewartry, to the value or ex-'tent of L. 100 Scots *per annum*, or be eldeſt ſon, or heir-apparent of 'the perſon ſo infeft,' &c. The qualification of the defender is a feu-diſpoſition, dated 21ſt May 1765, on which infeftment was taken the 22d; but no inſtrument of ſeiſine was extended till the 19th July thereafter.

The diſpoſition was only a nominal and truſt-right, without any intention of a real alienation, and intended ſolely as a colluſive tranſaction to protect from the proſecution of penalties. 2*do*, The infeftment taken on the 22d of May is unavailable, the law acknowledging no infeftment, except a *regular* inſtrument, executed and extended agreeable to the forms of law.

Pleaded for the defender: That the penalty of L. 20 Sterling, in which he was found liable by the ſheriff-ſubſtitute of Cromarty, was actually paid on the 16th of Auguſt 1765 into the hands of the miniſter of the pariſh, where it ſtill remains; and the reaſon for the receipt being granted of a prior date, was, that the miniſter, of that date, had obtained an obligatory miſſive for payment of that penalty towards public or pious uſes; that, though the decreet of the ſheriff had thus taken effect, and no good reaſon occurred why a ſecond penalty ſhould be inflicted for the ſame offence, yet immediate payment was offered to the purſuer of the L. 20 penalty, with ſuch expences as had been incurred on account of the defender. Though the defender, upon the 30th of April 1765, acted without a legal qualification, not the leaſt prejudice aroſe therefrom to any mortal; he ſerved no political job, and did hurt to no perſon breathing.

Whether the defender, on the 30th of April, acted by the inſtigation of Mr Pultney, or would have eſpouſed his ſide againſt Sir John Gordon, cannot now be determined; whatever his intentions were, he had no opportunity of carrying them into execution; and it is trifling beyond meaſure, to attempt to prove a man's intention by inference and vague conjecture. The action before the ſheriff by Mr Frazer of Ardochy, for recovering from the defender the penalties he had by law incurred, had nothing in it colluſive; the ſentence pronounced by the ſheriff was not milder than the law required; nor is there the veſtige of evidence of any concert or agreement, whereby the penalty was not to be inflicted, or not to be paid; the action was proſecuted *uſque ad ſententiam*, and the ſentence put in execution. A colluſive proceſs, is that in which a proſecutor and defender agree to conduct the action in ſuch a manner, that the defender ſhall be acquitted, or that a different judgment ſhall paſs from what otherwiſe would have been pronounced, had the action been fairly carried on; *Voet in tit. de praevaricatione.* Where two perſons offered themſelves at one and the ſame time to proſecute a popular action, the rule in the civil law was, *praetor eli-*

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gat idoneorem; *l. 2. ff. de popularibus actionibus.* Sir John Gordon was the perſon who named the defender a commiſſioner of ſupply, and he has carried on all his political operations in Cromarty by means of a ſet of nominal commiſſioners, who have neither property nor poſſeſſion within the county. Theſe circumſtances do not point him out as the perſon to be preferred to Mr Frazer for recovering the penalties; they ſeem rather to bar him *perſonali exceptione.*

In the caſe of Duff of Haſton *contra* Farquharſon of Coldroch, in 1757, the objection of colluſion was over-ruled, though the circumſtances were much ſtronger than what occur in the preſent caſe. It is immaterial to inquire, whether the defender has received any rents out of his lands or not. The law does not require actual poſſeſſion of the lands; it is enough to be infeft in them; for the act of parliament allows the alternative either of being infeft or in poſſeſſion.

The Lords 'found the colluſion pled by the complainer clearly proven, and therefore repelled the defence founded upon the decreet of the ſheriff of Cromarty, and ſuſtained the objection againſt William Forſyth his qualification as a commiſſioner of ſupply for that county; and found the complainer entitled to recover from him the penalty contained in the act of parliament for each of the times ſpecified in the complaint when he acted as a commiſſioner of ſupply, without being duly qualified.'

Upon a reclaiming petition and anſwers, 'the Lords adhered.'

P. C.

Act. *Solicitor Dundas.* Alt. *Ilay Campbell.* Clerk, *Kirkpatrick.*

No CI. *July* 4. 1769.

WILLIAM Lord HALKERTON, and other proprietors of Salmon-fiſhings on the River of Northeſk,

Againſt

JAMES SCOTT of Brotherton.

Conſtruction of cruives and cruive-dyke.

THIS proceſs for regulating the defender's cruives, was confined by the purſuers to ſeven articles. They complained of innovations and irregularities in the conſtruction of the cruives, and *contended*, That, prior to a deciſion in 1763, regulating the defender's cruives, there were ſeven cruives placed in the dyke, at or near an equal diſtance from each other.

2. That, ſince that deciſion, the defender had taken out all the above-ſaid ſeven cruives, and had placed three new cruives at the north end of the

dyke upon dry ground, or where water never runs but in time of ſpeat or floods, ſo that no fiſh could paſs through them but in time of great ſpeats.

3. That the place where the cruives were formerly erected, had been rebuilt nearly of equal breadth and height with the other parts of the dyke; and that it was fortified in ſuch a manner with wood, as to reſiſt the utmoſt violence of the river.

4. That there was no cruive in the middle of the dyke till the fiſhing ſeaſon in 1767 was moſtly over, and then one cruive only was placed in the middle of the dyke.

5. That in the new erected cruives two iron rods had been placed and fixed to the inſcales, by which the inſcales were kept from opening wider than three inches, and of conſequence no fiſh could puſh in againſt the current, unleſs they happened to ſtrike exactly upon the middle of the opening; whereas, by law and common practice, the inſcales ought to open and ſhut by the force of the current.

6. That, if any fiſh ſhould get through theſe cruives, they were intercepted by another dike with an angle in it ſo barricadoed with whins and bruſh-wood, that it was almoſt impoſſible a ſingle fiſh could get over it.

As the defender had eſtabliſhed the neceſſity of this check-dyke for the ſervice of the mills upon the ſides of the river, the purſuers only inſiſted, that the defender ſhould make no uſe of it for the purpoſe of fiſhing, as being contrary to act 1696, and that there ſhould be a gap in the middle ſtream of the river.

7. That the cruives were not conſtructed with an intention to catch fiſh, but to be ſubſervient to the defender's coble-fiſhing; and to keep them below the dyke; that, for this purpoſe, there were knots of wood placed preciſely in the entry betwixt the inſcales, which effectually impeded the paſſage of the fiſh into the cruives; and as the defender fiſhed with cobles and nets, both below the old cruive dyke, and betwixt it and the new rampart which is built above it, he had it in his power to catch the whole fiſh, without allowing any to paſs to the upper parts of the river.

The purſuers therefore *pleaded*, That the defender is not entitled to maintain his cruive-dyke in its preſent conſtruction, to the prejudice of the ſuperior heritors, and that he ought to be debarred from fiſhing by net and coble, till he ſhould produce documents in ſupport of ſuch right. They do not underſtand the aſſumption of the defender, that a right of cruive fiſhing, is the paramount or ſupereminent method of fiſhing, and that as ſuch it contains in it a right to fiſh in every more ſubordinate and inferior way; it indeed requires more expreſs grants than the other kinds of fiſhing, but this is owing to the circumſtance of its being thought pernicious to the navigation of a public river; and a more expreſs right is therefore requiſite to authoriſe it.

When a right of ſalmon fiſhing by cruives is given, and that right carried into execution, by the conſtruction of a cruive-dyke, the grant, explained by uniform poſſeſſion, cannot be altered or inverted, to the prejudice of the rights of the other heritors.

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The grant of cruives in favour of the defender, is no better nor ſtronger than the grants of other fiſhings, in favour of the other heritors The extent of each of their rights is, therefore, to be determined by the mode in which it has been exerciſed, conſiſtent with the public law; and the original meaning of the grants muſt be preſumed ſuch as immemorial poſſeſſion has explained them; 26th January 1665, heritors of Don *contra* town of Aberdeen.

Anſwered for the defender: That, by the 215th charter of David Bruce king of Scots, there was granted perpetually in feu to the burgeſſes and community of the borough of Montroſe, one of the defender's authors, the aforeſaid borough and pertinents, with fiſhings within the rivers of Southeſk and Northeſk *by cruives, zairs, and nets*, as antiently uſed, and pertaining to the ſaid borough.

That the defender, his authors, and predeceſſors, for ſome hundreds of years paſt, have been in the uninterrupted poſſeſſion of fiſhing ſalmon in the river of Northeſk, both by cruives, and by net and coble.

That, though it may be competent to the crown to challenge him, yet that the ſuperior heritors have no title to challenge his right of fiſhing with net and coble, which are no unlawful engines, unleſs they can ſhew a right to fiſh in thoſe parts of the river, where he exerciſes that mode of fiſhing. Theſe heritors do not diſpute his right to a cruive-fiſhing, which, as it is the moſt ſupereminent mode of fiſhing known, muſt, of neceſſity, include every other manner of fiſhing.

The circumſtances of the cruives, prior to the deciſion in 1763, can have no influence on this queſtion, as they have ever ſince been regulated agreeable to the judgment of the court.

2. The number of cruives are fewer now than formerly; but the number of cruives to be placed in a cruive-dike not having yet been regulated, nor the proprietor of a cruive-fiſhing tied down to keep up an equal number of cruives, the purſuers have no title to inquire, whether there are fewer or more now than were in former times. The three cruives now in the dike are not nominal, nor are they placed where no part of the river runs; when the river was extremely low, there were 16 inches of depth of water within the inſcales, which was more than ſufficient to carry up a fiſh of any ſize.

3. The old cruive-holes have been filled up for the benefit of the cruive, and to prevent the mills of the defender and of Kinnaber from being deprived of water. Though the cruive-dike, in 1742, was ſeveral feet higher than it is at preſent, the court found the cruives might be raiſed as high above the water as the cruive-dyke.

4. The cruive-dyke had been deſtroyed by the break of the ſtorm in 1767; it was repaired and two cruives put up in April, and a third was erected, on the purſuer's complaining of the want of it.

5. At all times, till of late, the two bars in which the rungs of the inſcales are placed acroſs, were fixed to the bottom of the cruive, ſo as to be immoveable by any force of the water; but ſtill, there was ſufficient ſpace left for fiſh of any kind to paſs into the cruive, without which no benefit could be reaped from it; the two iron rods complained of, were only tried for a ſhort time, to keep the inſcales ſteady, and they are now removed. The inſcales are now rendered moveable at all

times,

times, ſo as not to make the leaſt reſiſtance to the entry of the fiſh, except what is occaſioned by the ſtream of the water, which no art can prevent.

6. The pretended barricade is no other than a cheque-dyke, kept up time out of mind in its preſent form, to convey water to the mills on both ſides of the river, which could not poſſibly be ſerved without it.

7. The purſuers are in a miſtake, in ſuppoſing the defender fiſhes with net and coble, betwixt the cruive-dyke and the cheque-dyke, that being impoſſible, as the cheque-dyke would prevent the drawing of the nets. As to the conſtruction of the cruives, the dyke in which the cruive-boxes are placed, is made to ſlop on both ſides, which is abſolutely neceſſary for its ſecurity. The cruive-boxes, which muſt of neceſſity have a foundation of ſtone to reſt upon, are placed as near as poſſible to the channel of the river, and only about ſix inches above it. The length of the cruive-box is equal to the thickneſs of the dyke in which it is placed, the ends of the box being on a line with the ſtones of the dyke. The dyke is built of no greater breadth than is neceſſary for its ſecurity, and the cauſewaying or ſhoeing lately added is very material for that purpoſe. The inſcales, in place of being taken out at the time of the Saturday's ſlop, are now, during that period, fixed cloſe by a ſtaple to the ſides of the cruive-box, having a full ell of wideneſs for fiſh to enter the cruive, and knobs of wood, of about three inches, are placed in the bottom and lid of the cruive-box, to prevent the inſcales from going too cloſe.

'The Lords found the defender had right to a fiſhing by net and 'coble, as well as a fiſhing by cruives; and found, that he was 'not bound to alter the preſent height or breadth of the cruive-'dyke; but, in reſpect that the alterations, made thereon ſince the 'year 1762, appear to have been made, not with an intention to 'improve the cruive fiſhing, but the fiſhing by net and coble, and 'that they are prejudicial to the ſuperior heritors, and to the pre-'ſervation of the brood of ſalmon in the river; therefore find, that 'the ſhoeing or cauſewaying in the river, further down than the 'lower end of the keying ſtones, muſt be taken away and remo-'ved; that when, in forbidden times, the cruives are taken away, 'the defender is not entitled to fill up, with looſe ſtones, or other 'materials, the hecks or places from whence they are ſo removed; 'and, as to the cruives themſelves, find that the ſame muſt be built 'upon the channel or bottom of the river, and that the defender 'is bound to remove the *nob* or ſole at the bottom of the mouth of 'the cruives; but, as to the inſcales, find, that he is not bound to 'take the ſame out from the cruives in fiſhing time, but that it is 'ſufficient to fix them back, ſo as they remain open for the pur-'poſe of the Saturday's ſlop; and, as to the number of cruives, in 'reſpect of the immemorial uſage, and that the defender has not 'diminiſhed the number, with an intention to improve the cruive 'fiſhing, find, that he muſt place ſeven cruives as formerly, in-'ſtead of three which he now uſes.'

Upon a reclaiming petition and anſwers, the Lords adhered.

P. C.

Act. *Solicitor Dundas and Rae.* Alt. *Wright.*

No

No. CII. *Auguſt* 7. 1769.

HENRY BUTLER Factor appointed by the Barons of Exchequer upon the forfeited eſtate of Cluny,

Againſt

RONALD and ALEXANDER Mc DONALDS.

Annexing act. Removing. Proceſs.

THE queſtion was a removing from certain lands, part of the annexed eſtate of Cluny.

Pleaded for the defenders: The lands poſſeſſed by them are under the direction, not of the barons of exchequer, but of the truſtees for annexed eſtates.

By 25. G. II. c. 41. his Majeſty is empowered to veſt in truſtees certain forfeited eſtates, and, among the reſt, the eſtate of Cluny, for the purpoſes mentioned in the act. In conſequence of this ſtatute, certain truſtees have been appointed by two ſeveral commiſſions in 1756 and 1761. Theſe truſtees have the ſole management of the eſtates enumerated in the act, to the excluſion of the barons of exchequer.

Anſwered for the purſuer: There is no doubt, that, by the veſting act 20. G. II. c. 41. the barons of exchequer have the power of removing tenants, as well as of granting leaſes and levying the rents. It is *jus tertii* to the defenders to argue upon the different powers of the barons of exchequer and the truſtees for annexed eſtates; and it muſt be preſumed that thoſe officers know the limits of their reſpective duties and powers.

The Lords differed both as to the validity of the objection, and as to its competency. Some were of opinion, that here, as in every caſe, it was competent to a tenant to plead defect of title in a removing; and the defenders illuſtrated the matter by the compariſon of a ſecond factory, which ſuperſedes the firſt. But the majority, though inclined to ſuſtain the objection, had there been a competition between the barons of exchequer and the truſtees for annexed eſtates, did not think themſelves entitled to enter into it, *in hoc ſtatu*, as being *jus tertii* to the defenders. And therefore the court 'Repelled the defence, and decerned 'in the removing.'

Several other defences were pleaded in this proceſs.

After the ſummons had been called, a blunder having been diſcovered in the execution, it was ſent to the country in order to be executed of new. The defenders, in the mean time, put up proteſtation for not inſiſting; but the ſummons being returned with the new execution, and preſented before the lapſe of the days of compearance to which it had been made, the proteſtation was immediately ſcored. Upon this *ſpecies facti* the defenders pleaded, 1*mo*, That the ſecond execution of the ſame

ſummons was irregular. But this was repelled; becauſe, at the time of the ſecond execution, the ſummons had not been brought into court.

2*do*, That it was improper to call the ſummons before the days of compearance in the ſecond execution were elapſed, and conſequently that the proteſtation ought not to have been ſcored, but allowed to be extracted, whereby the inſtance muſt have periſhed, and a new ſummons become neceſſary.

This objection was likewiſe over-ruled; becauſe a party may ſiſt himſelf without any ſummons at all; and the preſent defenders muſt be conſidered as having renounced this dilatory defence, which ought to have been pleaded *in initio litis*. And that, though it was argued from the bar, that a litigant is not bound, by the compearance of his counſel, before the lapſe of the days: That the act of ſederunt concerning dilators, relates only to the caſe where the parties have actually come into court; and, that the objection now pleaded was formerly ſuſtained, where a ſummons had been called upon the very day of compearance; 2d January 1680, Arbuthnot, obſerved by Lord Fountainhall.

G. F.

Act. *King's counſel.* Alt. *Lockhart, Elphinſton.* *Reporter Kames.*

SUPPLEMENT

TO THE

FACULTY COLLECTION

OF

DECISIONS

From the Year 1765 to the Year 1769.

EDINBURGH:

Printed for J. BALFOUR.

M, DCC, LXXVI.

ADVERTISEMENT.

MANY Caſes of importance, decided in 1765, 1766, 1767, 1768, and 1769, having been omitted in the courſe of the preceding Collection, the Faculty was deſirous that they ſhould ſtill be collected. The SUPPLEMENT is intended to make up the deficiency in ſome degree.

SUPPLEMENT

TO THE

FACULTY COLLECTION

OF

DECISIONS

From the Year 1765 to the Year 1769.

No. I. *February* 13. 1765.

Mr ROBERT DALRYMPLE;

Againſt

Sir ROBERT GORDON.

TERM LEGAL AND CONVENTIONAL.

Sentence of Depoſition of a Miniſter affirmed by the Aſſembly.

A Miniſter having been depoſed by a ſynod, 28th April 1763, the ſentence was affirmed by the General Aſſembly, 1ſt June, who declared the priſh vacant from the date of their own ſentence.

Sir Robert Gordon the patron, refuſed to pay his ſhare of the Whit-ſunday ſtiped 1763, upon the ground that the depoſition took place from the date of the ſentence of the ſynod, which was prior to Whit-ſunday; and quoted Lord Bankton, II. 8. 220. and 227. to ſhow that the ſentence of the Aſſembly muſt draw back to that period.

'The Lords decerned for the ſtipend in queſtion, and found Sir 'Robert liable in expences.'

G. F.

Act. *Dav. Dalrymple.* Alt. *Lockhart.*

No. II. *February* 15. 1765.

CHARLES MACKINNON;

Againſt

Sir JAMES MACDONALD.

SUCCESSION. PERSONAL AND REAL.

If the actual *heir has acceſs to ſerve? Will his Deeds affect the Eſtate, though he be obliged to denude?*

THE eſtate of Mackinnon ſtood diſponed 'to John Mackinnon 'younger, and the heirs-male of his body; whom failing, to a-'ny other ſon of the body of John Mackinnon elder; whom failing, 'to John Mackinnon tackſman of Miſhiniſh.'

Upon the death of John Mackinnon younger, without iſſue male, Miſhiniſh ſerved as neareſt and lawful heir-male of proviſion, and was infeft.

Some years after, a ſon, Charles, was born to old Mackinnon.

Charles inſiſted in a proceſs againſt Miſhiniſh, as ſtated Vol. I. of the Faculty Collection, No. 204. and the Lords found, 'That the pur-'ſuer had right to the eſtate of Mackinnon from the time of his birth; 'and that the defender is obliged to denude thereof in his favour.'

Having thus prevailed againſt Miſhiniſh, Charles Mackinnon obtained himſelf ſerved heir of proviſion in ſpecial to John Mackinnon younger, his brother, and brought an action of reduction-improbation for ſetting aſide the ſale of the lands of Strath part of the eſtate of Mackinnon, which Miſhiniſh, during his poſſeſſion, had ſold to John M'Kenzie writer to the ſignet, for behoof of Sir James Macdonald of Macdonald, who was already infeft.

Pleaded in defence: 1*mo*, The petitioner is bound by the judgment in the caſe of Miſhiniſh, being his only title in the preſent action. But that judgment implied, that titles were properly made up by Miſhiniſh: It does not find his right to have been *void;* but, on the contrary, decerns him to *denude*, and finds that the right of the purſuer commenced from his birth.

2*do*, As Miſhiniſh was rightly ſerved, ſo all his onerous acts and deeds muſt be effectual againſt the eſtate.

3*tio*, The obligation to denude was merely perſonal, and cannot affect the right of a third party, who purchaſed, *bona fide*, upon the faith of the records, while the right of Miſhiniſh ſubſiſted.

Anſwered,

Anſwered, to the 1*ſt*: No ſolid argument can be drawn from a critical interpretation of the words of the interlocutor in the caſe of Miſhiniſh, pronounced betwixt different parties, where the only queſtion was, whether the remoter heir was bound to denude upon the birth of the nearer? and where the validity of purchaſes from the heir in poſſeſſion did not come to be diſputed.

To the 2*d*, *Eſto*, that Miſhiniſh was rightly ſerved, ſtill his right was conditional merely, and defeaſible in a certain event; and *that* intrinſically, from the very nature of the right; like a right to excambed lands, or a right to lands gifted by a donation *inter virum et uxorem*, which, though indefeaſible *ex facie*, are affected by an implied condition, upon the exiſtence of which they become void, as if they had never exiſted.

Or perhaps the right of Miſhiniſh may more properly be conſidered as containing a *ſuſpenſive* condition; and, ſince the condition failed, the right muſt be held to have been void from the firſt; like an infeftment *a me*, which is pendent on the condition of the ſuperior's confirmation; or an infeftment in warrandice, pendent on the condition of eviction.

In this view of the caſe, Miſhiniſh muſt be held to have been a truſtee for behoof of the nearer heir, when he ſhould exiſt. And an implied truſt is equally effectual, as if it had been expreſſed: Thus, where a ſum of money is provided to huſband and wife for their liferent-uſe allenarly, and to the children to be procreated of the marriage in fee, the huſband is underſtood to be fiar; but it is only as truſtee for the children *naſcituri*.

But, allowing the condition of the exiſtence of male iſſue of Mackinnon elder not to have been ſuſpenſive of the right of Miſhiniſh, but *reſolutive* merely; ſtill, it will not follow, that his acts and deeds could affect the fee of the eſtate.

A putative heir, ſerved upon the ſuppoſition that the nearer heir does not exiſt, poſſeſſes under a ſimilar condition; and the conſequence is, that, as ſoon as the true heir appears, his infeftment becomes void, and every burden flies off, which he has impoſed upon the eſtate. In the ſame way, in the caſe of the proteſtant heir, who has made up titles upon the act 1700, c. 3. by ſervice and infeftment; if the popiſh heir ſhall take the formula within ten years, the former infeftment is reſolved; and every deed, by which the eſtate might have been affected, is reſolved with it.

To the 3*d*, There is no ground for ſaying that Miſhiniſh was under a *perſonal* obligation to denude upon the exiſtence of the nearer heir. On the contrary, the condition was inherent in his right. Nor has this doctrine any tendency to weaken the ſecurity of the records. Except in the caſe of an entail, the law promiſes no ſecurity to a purchaſer from looking into the laſt infeftment, whether it proceeded upon a charter or a retour. If it proceeded upon a retour, as in this caſe, it is incumbent upon him to look into the deſtination in the charter, and he cannot be ſecure, if the ſervice be not agreeable to that deſtination, or if any of the heirs preferably called do or may exiſt.

Replied:

Replied: It is inconſiſtent with what has been admitted by the purſuer, to hold that the right of Miſhiniſh was pendent upon a *ſuſpenſive* condition. It is an agreed point, that the purſuer has no right to the rents prior to his birth; and the inſtances of reſolutive conditions inherent, *vi legis*, appear to be miſtaken. For, with reſpect to a right of excambed lands, the contract of excambion points out the nature of the right, and puts the purchaſer on his guard. With reſpect to lands gifted by a huſband to his wife, the deſignation of the diſponer is a ſufficient warning; and, as to purchaſes from the proteſtant heir, he is always ſerved *virtute actus parliamenti*, which is equivalent to a recital of the whole ſtatute.

The Lords 'ſuſtained the minute of ſale entered into between John 'Mackinnon of Miſhiniſh, and John Mackenzie writer to the ſignet, 'with the ſeiſine thereon, and diſpoſition in implement of the ſaid mi-'nute, by the ſaid John Mackinnon, in favour of the ſaid John Mac-'kenzie, as ſufficient to exclude the purſuer's title; and, therefore, aſſoil-'zied from the whole concluſions of the purſuer's libel.'

Afterwards, Charles Mackinnon raiſed a new ſummons, in which he ſubſumed, that the ſervice of Miſhiniſh was erroneous, and contrary to law; and concluded, that it ſhould be declared to have been null and void *ab initio.* This action having been remitted to the former, which was kept in dependence by a petition, introduced a new field of argument.

Pleaded for the *purſuer:* By the Roman law, he is heir 'Quem ne-'mo praecedit, aut praecedere poteſt.' This was the rule in inteſtate ſucceſſion, which depends upon the implied will of the defunct; much more ought it to hold in ſucceſſion by deſtination, which is founded upon his expreſs will; and, it is a clear contradiction to that will, if a perſon, who is called *after* another, be allowed to enter to the ſucceſſion before that other has failed.

In like manner, the ſubſtitute was never admitted, ſo long as there was a poſſibility that the inſtitute might exiſt. Accordingly, in our ſettlements, the clauſe, *quibus deficientibus*, has always been underſtood to denote *quandocunque deficientibus.* The caſe muſt have often occurred in tailzied ſucceſſion; yet there is no example of a remoter heir attempting to ſerve till that of Leven in 1677, where the claim was rejected. And though afterwards, in the caſe of Roſehaugh in 1708, the remoter heir was admitted to ſerve, it was only with a view of avoiding the inconveniencies of a vacant fee, not that he was conſidered as the true heir; for he was found obliged to denude, as ſoon as the true heir exiſted.

If Miſhiniſh ſhall be conſidered as having been the true heir at the time of his ſervice, the conſequence is, that, though he had not ſerved till after the purſuer's birth, he muſt ſtill have been preferred: The right could not depend upon the *time* of the ſervice; nay, if he was regularly ſerved at all, he could not have been obliged to denude. *Semel haeres ſemper haeres*; if the right was once veſted in him, it could not determine upon a future contingency.

Such

Such is the doctrine of the Roman law; and, though the *forms* of feudal conveyances cannot be regulated by that law, yet there is no inconſiſtency in ſuppoſing that the effect of the right, after it is conſtituted, may be determined by it.

And the inconveniencies, which may be ſaid to ariſe from keeping the fee vacant, are not to be put in the balance with the injuſtice of allowing the remoter heirs to enter, and ſquander or ſell the eſtate. But all thoſe inconveniencies may be obviated, by veſting the eſtate in a *curator bonis*, with powers ſimilar to thoſe of a truſtee in an Engliſh contract of marriage, who may hold the eſtate for many years, for behoof of heirs unborn, without any inconvenience.

Indeed the end may be attained in a different way, by allowing the heir exiſting to ſerve in the mean time, and to make up feudal titles; but ſo as, upon the exiſtence of the nearer heir, his ſervice and infeftment may become null and void, *ab initio*.

And ſo it is in the conditional inſtitutions of the Roman law. If the condition exiſts, the inſtitute is heir, and was heir from the death of the teſtator; if the condition fails, he is not heir, nor ever was heir from the beginning. Again, if the inſtitute will find caution, he is admitted to poſſeſs, and there is no place for a *curator bonis*; *l.* 12. *D. qui ſatiſd. cog.* Upon this authority, the purſuer may admit that Miſhiniſh was intitled to poſſeſs, nay, that he was intitled to make up feudal titles: But that poſſeſſion, and thoſe titles, will not invert the nature of his right, or make it abſolute and indefeaſible, when it was plainly conditional, by the very titles upon which he was admitted to the poſſeſſion, and defeaſible upon the exiſtence of the heir who was called before him.

Anſwered: The doctrine of the purſuer would be attended with the moſt extraordinary conſequences. In a ſettlement like the preſent, there might be a poſſibility of the exiſtence of a nearer heir, for half a century or more. During all that period, the vaſſals of the defunct would have no ſuperior; his ſuperior no vaſſal; his creditors could do no diligence againſt the eſtate; his debtors could not make payment; his heirſhip-moveables would periſh without any to uſe them.

To remedy theſe inconveniencies, by allowing the fee to fall into the hands of the ſuperior, would certainly be contrary to the will of the defunct. The expedient of appointing a *curator bonis* would be but a partial remedy, ſuppoſing it to be competent; and the pernicious effect of it to the country in general is obvious.

The ingenious ſubtleties of the Roman law do not enter into this queſtion.

The maxim, that an heir is *quem nemo praecedere poteſt*, is not received with us. On the contrary, a father may ſerve heir to his ſon, though there is always a poſſibility of the exiſtence of iſſue of his own body, by whom he would be excluded; *Stair* III. 5. 50. In the ſame manner, a ſiſter may ſerve heir to her brother; a brother conſanguinean may alſo ſerve, though in both theſe caſes, there is a poſſibility of a nearer heir. The chancery is bound to iſſue brieves in favour of the *actual* heir; and the queſtion is, *quis* ſit propinquior haeres, not *an* ſit, or quis eſſe *poſſit?*

The queſtion, whether the actual heir ſhould be allowed to ſerve, appears to have occurred for the firſt time in the caſe of Corehouſe, *ann.* 1647, and was adjuſted by the Lords upon a reference. In ſtating that caſe, Lord Stair, III. 5. 50. gives his opinion, that the perſon ought to be ſerved who, at the time of the deceaſe, is neareſt heir.

It is true, that in the competition about the ſucceſſion of the eſtate of Leven, 16th February 1677, Bruce *contra* Melvil, obſerved by Lord Stair, the court, by a plurality, refuſed to allow the actual heir to ſerve, and left the eſtate to be adminiſtrated by a *curator bonis*; but, upon looking into that deciſion, reaſon will be found for not holding it as a precedent.

Accordingly, the next time the queſtion came to trial, in the ſucceſſion of Sir George Mackenzie, the actual heir was allowed to ſerve, 2d January 1708, obſerved by Preſident Dalrymple and Lord Fountainhall, both of whom remark, that the judgment proceeded upon no ſpeciality, but upon the abſtract point, as to which the Lords were unanimous.

Soon after, an opportunity occurred of again giving judgment upon the ſame point. For, the poſſible heir having exiſted, an action was brought in his name, and the heir ſerved decerned to denude; Fountainhall 6th and 13th December 1709; and the ſame judgment was given in the original queſtion with Miſhiniſh in 1756.

'The Lords ſuſtained the defence, and aſſoilzied from the reduc-
'tion of the ſervice.'

G. F.

Act. *Ferguſon, Burnet, John Campbell* jun. *H. Dundas.*
Alt. *Lockhart, Garden, Sir David Dalrymple.*

No. III. *February* 15. 1765.

Mrs ANN MACDONALD;

Againſt

CHARLES MACKINNON.

PERSONAL AND REAL.

A Jointure provided by the actual Heir in poſſeſſion, if good againſt the Eſtate?

JOHN MACKINNON tackſman of Miſhiniſh married Ann Macdonald, daughter of Donald Macdonald of Benbecula, and, by poſtnuptial contract, provided her, in the event of her ſurvivance, in a liferent-annuity of 200 merks.

During

During the marriage, Miſhiniſh acquired the poſſeſſion of the eſtate of Mackinnon, in the manner explained in the preceeding deciſion. And, upon the narrative, that a ſmall additional tocher had been paid him, he provided her in the locality of certain lands, part of the eſtate of Mackinnon.

After the death of Miſhiniſh, an action was brought by his widow againſt Charles Mackinnon, now of Mackinnon, for the maills and duties of her locality-lands.

Sundry objections were pleaded to the titles produced by the purſuer; but what the defender relied on, was the general argument of the defect of power in Miſhiniſh to burden the eſtate.

'The Lords repelled the defences.'

G. F.

Act. *Montgomery, Wight.* Alt. *Burnet.*

No. IV. *February* 22. 1765.

JANET STEEL;

Againſt

ALEXANDER Earl of Home.

HERITABLE AND MOVEABLE.——PRESCRIPTION.

Perſonal Bond before 1641, *if made moveable by Aſſignation or Bond of Corroboration after it?—If interrupted by a Proceſs on inept Titles?*

IN 1638, James Earl of Home as principal, and George Home younger of Wedderburn, William Home of Ayton, Sir Archibald Douglas of Spot, Sir Robert Douglas of Blackerſton, and Alexander Home of Haliburton, as cautioners, granted bond to Laurence Henderſon, whom failing, to his two daughters, Janet and Barbara, for 3000 merks, with annualrent and penalty.

In 1650, Laurence Henderſon, with conſent of his two daughters, conveyed the bond to his other two daughters, Iſabel and Margaret.

In 1663, the Earl as principal, with Alexander Home of Ayton, and Sir Robert Douglas of Blackerſton as cautioners, granted bond of corroboration to Iſabel and Margaret, accumulating the principal and annualrents into a capital of 3630 merks.

In

In the ſame year 1638, the Earl as principal, with Sir David Home of Wedderburn, Sir Archibald Douglas of Spot, and Alexander Home of Haliburton, granted another bond to Laurence Henderſon and his two daughters for 4000 merks.

In 1660, this bond was in like manner aſſigned to Iſabel and Margaret.

And in 1663, a like bond of corroboration was granted for the accumulated ſum of 4840 merks.

Inhibition followed upon theſe ſeveral bonds in 1664.

A proceſs for payment appears to have been alſo brought, and an extracted act was produced, bearing date 31ſt January 1682.

Several markings appeared on the margin of the act, one of them of 25th July 1688, in theſe words, 'Aviſandum *ut ſupra*, and grants cer-' tification againſt the defender for not production of his other titles, ' (ſigned) John Lockhart.'

Margaret Henderſon, one of the creditors in the bond, married Henry Aldcorn.

Upon her death in 1723, Richard Alcorn her ſon, confirmed her ſhare of the bond for 3000 merks. And, upon the 22d of June 1728, executed a ſummons againſt the then Earl of Home for payment of both bonds; and, having taken decree *cognitionis cauſa*, obtained decree of adjudication in 1730.

James Alcorn the ſon of Richard, having ſerved heir in general to his father, diſponed his right to Anna Yule his mother, who inſiſted in an action of maills and duties.

Anna Yule having died during the dependence, all the above mentioned rights and titles were adjudged by Janet Steel from James Alcorn, as charged to enter heir to his father Richard, his grand-father Henry, and his mother Anna Yule.

In 1759, Janet Steel wakened the proceſs of mails and duties, in which various defences were pleaded.

BIBLIOTHECA·BODLEIANA·

I. *Heritable and moveable.*

The firſt defence was, that the adjudication, at the inſtance of Richard Alcorn, was null and void, as led upon an inſufficient title; ſo that the after adjudication of his intereſt by Janet Steel, muſt be ineffectual.

The two bonds were both granted before the 1641. They were therefore heritable, as bearing intereſt; and could not be carried by Richard Alcorn's confirmation as executor to his mother.

The act 1661, c. 32. has no retroſpect farther than to the 16th of November 1641, the date of the reſcinded ſtatute; and it does not vary the caſe, that thoſe bonds were aſſigned in 1659 and 1660, or that bonds of corroboration were granted in 1663.

The

The ſole purpoſe of the *aſſignations*, was to tranſmit the right to Iſabel and Margaret, *tantum et tale*, as it ſtood in their father; or, rather as it would have ſtood in Janet and Barbara, the original ſubſtitutes, had no aſſignation been granted. An aſſignation has no other effect than to carry the right as it was in the cedent. So ſays Lord Stair, in treating of the aſſignation of heritable bonds, III. 3. 15. And ſo it was found, December 12. 1627, Falconer *contra* heirs of Beatie, in the caſe of a bond heritable as bearing annualrent; and 28th January 1708, Muirhead *contra* Lockhart; and 17th November 1747, Kennedy *contra* Kennedy, in the caſe of bonds heritable by a clauſe ſecluding executors.

As to the bonds of *corroboration*, they gave no additional ſecurity, the only new obligants being the heirs of the original debtors; they had no other effect than to accumulate the intereſt, and were granted *accumulando jura juribus*. A moveable bond of corroboration does not impair the original heritable ſecurity, as appears from Dirleton, *voce*, *Heir and Executor*, and, Bankton II. 1. 39. as well as from the deciſions marked in the Dictionary, *Heritable and Moveable*, p. 372. This doctrine was held in the deciſion, 8th January 1740, Duke Hamilton *contra* Earl of Selkirk, Dict. *Heritage and Conqueſt*, where it was found that a moveable bond taken for the principal and annualrents, due upon an heritable bond, did not innovate the ſecurity as to the principal ſum, which deſcended to the heir of conqueſt, while the accumulations deſcended to the heir of line.

Anſwered: When Laurence Henderſon aſſigned the two bonds to his younger daughters, long after the 1641, he could have no view of making them deſcendible to *heirs*. Had they *purchaſed* ſuch bonds, they would have become moveable in their perſon; and it rather ſtrengthens the argument, that, in place of being purchaſed, they were aſſigned by their father, as a portion to his daughters.

But the matter is ſtill clearer upon the footing of the bonds of corroboration. Theſe were certainly 'contracts and obligations for ſums of 'money, with clauſe of annualrent, made and dated after the 16th of 'November 1641;' and, therefore, in terms of the ſtatute 1661, muſt be 'holden and interpreted to be moveable bonds.'

It is a miſtake to ſay that theſe bonds were merely corroborative of the original bonds. They are granted to the daughters in place of the father, for different ſums, with different penalties, payable at different times. If the creditors had taker up the money in 1663, and lent it to another debtor, upon a bond in the ſame terms with the original bond, the debt would have been moveable; if ſo, it is difficult to ſee why the ſame conſequence ſhould not follow, when a new ſecurity is taken from the ſame debtors.

'The Lords found, that the principal ſums contained in the original 'bonds of 3000 and 4000 merks, being heritable, as the law ſtood 'at the time when they were granted, were not rendered moveable, 'either by the aſſignations, or by the bonds of corroboration granted in the 1663; and conſequently, that Richard Alcorn's confirmation, as executor to Margaret Henderſon his mother, did not 'carry or veſt in him any right to her ſhare of the principal ſums,

'contained in the original bonds; and, therefore, that the decrees 'of conſtitution and adjudication, at Richard Alcorn's inſtance, are 'in ſo far void and null: But found, that the confirmation of Ri-'chard Alcorn, as executor to his mother, did carry her ſhare of the 'principal ſums contained in the bond of corroboration 1663, in ſo 'far as the ſame were made up of bygone annualrents, which had 'fallen due upon the bonds of corroboration, from the death of 'Henry Alcorn his father; and, therefore, in ſo far ſuſtain the de-'cree of conſtitution and adjudication at Richard Alcorn's in-'ſtance.'

II. *Preſcription.*

The *ſecond* defence was the negative preſcription.

To this it was anſwered, That the preſcription had been interrupted by proceſs.

Replied for the Earl of Home: 1*mo*, The ſummons executed upon the 22d of June 1728 was inept: That ſummons was raiſed by Richard Alcorn, as executor confirmed to Margaret Henderſon his mother; but the bonds being granted before 1641, were *heritable*, and could not be carried by confirmation.

As, therefore, Richard Alcorn had made up no proper title to the bonds, ſo an action, at his inſtance, can no more be conſidered as an interruption, than an action at the inſtance of a perſon who had no connection with the creditors. The mere *jus ſanguinis* is no title, active or paſſive.

But, 2*do*, allowing that ſummons to have been an interruption, the preſcription had run before it was raiſed.

For, computing backward from the execution of the ſummons 22d June 1728, the 40 years will run to the 22d of June 1688; and, if no judicial proceedings appear, during that interval, the bonds muſt have been preſcribed before the commencement of the action.

For inſtructing ſuch proceedings, the purſuer produces no more than an act, ſaid to have been granted in 1682; but he has not produced the ſummons in that pretended action, nor any other ſtep of proceſs. The markings upon the act deſerve no credit. Three of them are dated in 1682, but theſe are neither ſigned nor authenticated in any reſpect. The fourth, bearing date 25th July 1688, does indeed bear a ſignature: But, 1. *quomodo conſtat*, that it is the ſubſcription of a judge? 2. The proceſs muſt have been by that time aſleep, as no ſtep appears to have intervened between the 1682 and the 1688.

At any rate, 3*tio*, The act is no interruption, with regard to the bond for 3000 merks, in reſpect it appears from the act itſelf, that the purſuer reſtricted his demand to the bond for 4000 merks.

Duplied for the purſuer, to the *firſt*: Though the objection to the title of Richard Alcorn were admitted, it would not follow that the ſummons at his inſtance was not a ſufficient interruption.

A title to take, and a title to interrupt preſcription are different: To conſtitute the firſt, it is neceſſary, that legal titles be made up; the other, being no more than an intimation to the debtor that the creditor has not relinquiſhed his right, may proceed in the name of a perſon who has the radical right in him, though he may not have followed out the forms neceſſary to give him the *jus exigendi*. This doctrine ſeems to be ſupported by the opinion of Lord Stair, II. 12. 26.; and, in the caſe 26th July 1637, Ld. Lawers *contra* Dunbars, an interruption was ſuſtained, upon diligence at the inſtance of a ſon, who had confirmed executor to his mother, in a ſubject which he ought to have taken up as executor to his father.

To the 2*d*, As ſoon as an act is extracted, the warrants of it are ſent to the record, ſo they could not be produced; but, at any rate, there is no neceſſity to produce warrants *poſt tantum temporis*.

The appearance of the ſignatures upon the act is explained from the ſtatute 1686, c. 3. That ſtatute requires, that, from and after the 1ſt of November 1686, all interlocutors be ſigned by the judge, which ſhows that a contrary practice had formerly prevailed. Accordingly, the markings, prior to the ſtatute, are unſigned; but that of 25th July 1688, is ſigned by Lord Caſtlehill, by whom it was pronounced. And there is no ground to preſume that the proceſs was aſleep. *Omnia praeſumuntur ſolemniter acta*; beſides, in thoſe days, it was thought ſufficient to keep a proceſs from ſleeping, that it was called within the year, though there was no marking upon it; as appears from the deciſion Home, November 1682, Home *contra* Earl of Home, Dict. *Proceſs*, § *Wakening*.

To the 3*d*, The act appears to have been deſigned for proving the paſſive title againſt one of the cautioners, as repreſenting his grandfather, who was bound only in a bond for 4000 merks; and, therefore, does not imply a paſſing from the other.

'The Lords repelled the defence of preſcription, ſo far as concerns 'the bond for 4000 merks; but found the bond for 3000 merks 'preſcribed.'

The point of preſcription was afterwards taken up on a different footing, in conſequeuce of certain alledged acts of interruption, which were not before the court, when this interlocutor was pronounced.

G. F.

Auchinleck, Reporter. Act. *Miller* Advocatus, *John Dalrymple.* Alt. *Lockhart, Rae.*

No. V.

No V. *February* 27. 1765.

CORRIE;

Againſt

Mr JAMES PHILP.

HUSBAND AND WIFE.——HERITABLE AND MOVEABLE.——MUTUAL CONTRACT.

Bond cujus dies ceſſit, *If it falls under the Jus Mariti?—Principal payable after the Husband's death, though Intereſt current from a preceding Term.—Can a Woman, married* without Contract, *retain her Tocher in lieu of her legal Proviſions?*

IN 1749, Mr John Philp executed a bond of proviſion to his daughter Margaret, for 12000 merks.

The bond was made payable at the firſt term of Whitſunday or Martinmas after his death, with intereſt from the term preceding. And it contained a clauſe, 'That, if ſhe die before ſhe be married, ſhe ſhall 'have right only to diſpoſe of 5000 merks, of the proviſion above 'mentioned, by teſtament or otherwiſe; but, if ſhe be married, to have 'power to diſpoſe of the whole to her huſband, her heirs, executors, or 'aſſignees.'

By an after explanatory deed, Mr Philp declares, 'That it ſhall be 'in the power of his ſaid daughter, if ſhe die unmarried, to diſpoſe of, 'and convey, to any perſon ſhe ſhall think proper, for any cauſe, one-'rous or gratuitous, the ſaid ſum of 5000 merks.'

In 1754, Margaret Philp married Joſeph Corrie town-clerk of Dumfries, without conſent of her relations, or contract of marriage.

Mr Philp, who had been ſtruck with a palſy in 1751, died 20th December 1760. Joſeph Corrie died bankrupt, in February 1761, leaving two children,

Margaret ſurvived her huſband for two years, and was ſupported by Mr James Philp her brother; againſt whom an action was brought by the truſtee for Joſeph Corrie's creditors, for payment of the bond of proviſion.

Pleaded in defence, 1*mo*: The huſband having died before the term of payment, the bond could not veſt in him, *jure mariti*. Had Margaret herſelf predeceaſed that term, the bond would have become ineffectual; while, therefore, her huſband lived, ſhe had but a *ſpes ſucceſſionis*; and conditional rights fall not under the *jus mariti*, unleſs the condition be purified, during the ſubſiſtence of the marriage. So it was expreſsly found 7th February 1693, and 18th December 1694, Fotheringham *contra* Earl of Home; and Lord Bankton gives his opinion to the ſame purpoſe, I. 5. 87.

It may be true, that Margaret might have aſſigned the bond to her huſband; but many ſubjects may be aſſigned, which are not carried by the

the operation of law; as bonds ſecluding executors, rents of lands which may become due after the diſſolution of the marriage, or a future ſucceſſion.

2*do*, As the bond, though not payable till Whitſunday 1761, the term after the father's death, bore intereſt from the Martinmas preceding, it was heritable, *quoad fiſcum et relictam*, and could not fall under the *jus mariti*. And, in ſupport of this poſition, the defender referred to ſeveral deciſions, as 8th January 1624, Henderſon's bairns *contra* Murray; 10th March 1630, Lindſay *contra* town of Edinburgh; and 31ſt July 1666, Gray *contra* Gordon, obſerved by Dirleton.

It was argued, that as bonds bearing annualrent had come in place of rights of annualrent, thoſe *feoda pecuniae* introduced from the prohibition of intereſt of the canon law, ſo all ſuch bonds were originally conſidered as heritable, and they are ſtill conſidered in that light, as to the intereſts of huſband and wife, in conſequence of the exception in the act 1661. A diſtinction has indeed been made in this reſpect, before and after the term of payment; but, whether the term of payment of the *principal*, or of the *intereſt*, be the criterion, has been variouſly decided, as may be ſeen in the caſes obſerved in the Dictionary of deciſions, *voce*, Heritable and Moveable, p. 370. and in ſeveral other caſes.

But the bond now in queſtion is of a peculiar nature; as, upon the exiſtence of the condition, it draws back to the term preceding the father's death, from which period, it was a *fors* bearing intereſt, and therefore heritable.

3*tio*, Suppoſing the ſum in the bond ſhould not be found heritable, the defender muſt be intitled to retain the expence laid out by him in maintaining Margaret, after her huſband's death; for, had ſhe been ſtill alive, ſhe would have been allowed retention, in ſecurity of her legal proviſions.

To prove that Margaret herſelf would have been intitled to retain, reference was made to the deciſions upon that point, obſerved in the Dictionary, *voce*, Mutual Contract; and it was argued, that the protection of the court could not be limited to thoſe who had entered into marriage-contracts; but ought, *a fortiori*, to be extended to ſuch improvident women, as having married unadviſedly, and without the concurrence of their relations, were ſo much more the objects of compaſſion.

The opinion of Lord Bankton, I. 5. 89. was appealed to, as expreſs upon that ſubject; alſo, a deciſion obſerved by Lord Fountainhall, 10th November 1687, creditors of Ogilvy *contra* Scot, with ſundry Engliſh reports, as 1. Peer Williams, 382, Jacobſon v. Williams; 2. Vernon 494, Lady Oxenden's caſe; 2. Vernon 626, Lupton *et ux. verſus* Tempeſt; 3. Peer Williams 202, Brown *et ux. verſus* Ellon.

Anſwered to the 1*ſt*: As Margaret ſurvived her father, the bond was fully veſted in her, and conſequently fell to her huſband *jure mariti*. And it made no difference, that it was not payable till the term after the father's death; *dies ceſſit*, *licet nondum venerit*.

The authorities therefore are miſapplied; they relate to conditional

obligations; but, though *dies incertus* habetur pro conditione, it is not ſo *in die certo*, which only delays the fulfilment, but does not ſuſpend the conſtitution of the obligation.

To the 2*d*: It has always been underſtood to be the law of Scotland, that bonds bearing annualrent are moveable *before* the term of payment.

This appears from the narrative of the act 1641, c. 57. Lord Stair, II. 1. 4. and Sir George M'Kenzie, II. 2. § pen. lay down the doctrine in expreſs terms; and it has been adopted in the deciſions of the court, as 26th February 1629, Douglas *contra* Macmichael; 26th June 1668, Dick *contra* Ker; and, 22d November 1748, Craig *contra* executors of Craig.

Theſe authorities afford a ſufficient anſwer to the defender's plea; and the principle upon which the rule is founded is well known. Nor is there any thing peculiar in the preſent caſe. Every bond carries intereſt from the period of advancing the money, unleſs there be ſome ſpecial clauſe to the contrary; and it makes no difference, that here the intereſt run from the term before the father's death, ſtill no intereſt was payable till the following term; and, at any rate, it is not the term of payment of the *intereſt*, but of the *principal*, that is conſidered.

To the 3*d*: The deciſions referred to, were all given in the caſe where a marriage-contract had interveened; but, when a woman marries without a contract, ſhe betakes herſelf to the legal proviſions, which ſhe can only claim out of the free effects of her huſband, after his debts are paid; and the ſame thing applies to the claim of retention for her aliment.

The caſe of Ogilvy *contra* Scot was of a very ſingular nature, and Lord Harcarſe, who collects it, *voce*, Contracts of Marriage, ſeems to think, that the doctrine can only apply to the caſe where the father is the party contractor.

The Lords 'found the bond moveable, but allowed retention of the 'intereſt which fell due, during Margaret Philp's life.'

G. F.

Act. *Miller* Advocatus, *Macqueen*. Alt. *Lockhart*, *Sir David Dalrymple*.

No. VI.

No. VI. *February* 28. 1765.

VERONICA RANNIE, and ROBERT, ANDREW, and MARK PRINGLES;

Againſt

JOHN PRINGLE of Crichton.

DEATH-BED.

Reſerved Faculties exercible on Death-bed, or by Teſtament.

IN 1748, Mark Pringle, of Crichton, diſponed thoſe lands to John Pringle his ſon, and his heirs, reſerving his own liferent, with full power to alter, ſell, or burden.

The deed contained a clauſe, declaring that, by acceptance thereof, the diſponee ſhould be bound to pay all bonds of proviſion granted, or to be granted, and all debts and legacies which ſhould be due by the diſponer at his death.

Upon this diſpoſition, a charter under the great ſeal was expede, and infeftment taken.

In 1754. Mark Pringle, in conſideration of L. 2000 being paid to him, which his ſon had got in portion with his wife, renounced the reſerved faculties, with reſpect to a part of the lands, of about L. 300 *per annum.*

In 1758, having married a ſecond wife, he ſo far altered the deed 1748, as to ſettle the eſtate upon John and his heirs-male, whom failing, upon his ſons by the ſecond marriage; and, in this laſt deed, he reſerved the ſame powers as in the former.

Mark Pringle granted ſundry deeds in exerciſe of theſe reſerved powers, particularly, an heritable bond for L. 1000 Sterling, in favour of his youngeſt ſon, which was executed by notaries, within nine days of his death.

John Pringle inſiſted in a reduction of this deed, and *pleaded*, 1*mo*, That he never had accepted of the diſpoſition 1748. He poſſeſſes part of the lands, in virtue of the onerous tranſaction in 1754. The reſt of the eſtate he is intitled to take up by ſervice as heir to his father. He cannot take it up in virtue of the diſpoſition 1748, that deed being revoked; and he will not take it up in virtue of the diſpoſition 1758; ſo that he is not affected by the reſerved powers which it contains.

2*do*, Even the expreſs conſent of the heir will not ſupport alienations on death-bed; 13th November 1728, Reids *contra* Campbell; 4th De-

eember

cember 1733, Inglis *contra* Hamilton; Dictionary, Death-bed; and 15th December 1744, Irvine *contra* Irvines. Much leſs can they be ſupported upon an implied conſent, inferred from the heir's acceptance of a diſpoſition.

3*tio*, A reſerved faculty to alter or burden *quandocunque*, muſt be exerciſed *habili modo*, that is, by a deed *inter vivos*, and in *liege pouſtie*, but cannot be exerciſed on death-bed; 25th February 1663, Hepburn *contra* Hepburn; alſo, Dict. *v.* Teſtament, § 4—6. Craig, II. 1. 25. and Stair, III. 4. 41. and III. 8. 29.

Anſwered for the defenders, to the 1*ſt*: There are various circumſtances tending to ſhow that the purſuer accepted the diſpoſition 1748; but it will not vary the caſe, though he ſhould be at liberty to repudiate it. If he is ſo, it can only be in conſequence of the diſpoſition 1758, which contains the ſame powers and faculties: Indeed it is a miſtake, to ſay that the diſpoſition 1748 was *revoked* by the diſpoſition 1758; on the contrary, the latter proceeds on the recital of the former, and the alteration made by it, in the order of ſucceſſion, is an exerciſe of the powers thereby reſerved.

To the 2*d*: The caſes of Reids *contra* Campbell in 1728, and Irvine *contra* Irvines in 1744, do not at all apply. No more was there found, than that the heir was not barred from reducing death-bed deeds, by having accepted of a diſpoſition in full of all he could demand at his father's death. In theſe caſes, there was not ſo much as a renunciation of the benefit of the law of death-bed; but, though an antecedent renunciation of this kind is not ſufficient to bar a challenge, as was found, in the other caſe quoted under this head, that of Inglis *contra* Hamilton in 1733, it cannot be thence inferred, that the purſuer is not bound by his acceptance of the deed 1748, which, being executed 12 years before the diſponer's death, can never be looked upon as an artifice uſed to defeat the law of death-bed; the light in which obligations, extorted from the heir, have been juſtly conſidered.

To the 3*d*: Though no perſon can affect his *heir*, properly ſo called, by a deed upon death-bed, or even by a teſtamentary deed, as appears from the authorities which have been referred to; yet, he can burden his *diſponee* by any deed, which is a proper declaration of his will, and is authoriſed by the terms of the diſpoſition. The diſponer has this power in the caſe of a diſpoſition to a *ſtranger*; and the heir who accepts of a diſpoſition is in the ſame caſe with a ſtranger, and is equally affected by every condition, which is an inherent quality of his right.

This doctrine is laid down by Lord Bankton, III. 4. 48. and it is ſupported by a variety of deciſions, ſtated in the Dictionary, *voce*, Death-bed; as 22d June 1670, Douglas *contra* Douglas; and 8th February 1706, Bertram *contra* Weir, where the exerciſe of the faculty on death-bed was ſuſtained on this ground, 'That the heir had accepted and 'bruicked by the diſpoſition ſo qualified.'

The purſuer has referred to a deciſion, 25th February 1663, Hepburn *contra* Hepburn, where the contrary doctrine appears to have been adopted; but, to this is oppoſed the late deciſion in the caſe of Lord Forbes, 12th February 1755, where it was eſtabliſhed by a judgment of the houſe

houſe of Lords, that reſerved faculties may be properly exerciſed upon death-bed.

Nevertheleſs, 'The Lords found, that the diſpoſition in the year 1748, 'was not revoked by the diſpoſition in the year 1758; but ſuſtain-'ed the reaſons of reduction of the bond for L. 1000 Sterling, as 'being granted on death-bed.

G. F.

Act. *Lockhart*, *Miller* Advocatus. Alt. *Montgomery*, *Sir David Dalrymple*.
Coalſton, Reporter.

No. VII. *March* 8. 1765.

CORPORATION of WRIGHTS of Glaſgow;

Againſt

JAMES CROSSE.

BOROUGH-ROYAL.

Coffin made by a Freeman by the employment of an Unfreeman, acting as an Undertaker.

JAMES CROSSE, a freeman wright of Glaſgow, and ſome time deacon of the corporation, was employed by Daniel Miller, an unfreeman wright, to make two coffins at different times.

Miller had the direction of the funerals in both caſes, and provided all the articles wanted. In the firſt inſtance, the wood of the coffin was got from Miller, and two of his ſervants aſſiſted Croſſe in making it, at his ſhop in the city of Glaſgow. In the ſecond, part of the wood was brought from Miller's, and the whole work performed by Croſſe and his ſervant.

Upon a complaint, the magiſtrates condemned Croſſe to a fine of 100 merks, as guilty of a breach of the excluſive privileges of the corporation, by packing and peeling with unfreemen.

Croſſe having ſuſpended, it was *pleaded* for the chargers, That, as Miller was the perſon employed to furniſh the coffins, and ſupplied the wood for that purpoſe; ſo the intervention of Croſſe was no more than a colour to enable an unfreeman to work with impunity within the liberties.

Anſwered: Miller might have contracted with an unfreeman to make the coffin, and then brought it into the city ready made; ſo that, to find

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t
hat he could not employ a freeman to make it, would be to the manifeſt hurt of the corporation.

Indeed, the furniſhing of coffins cannot come under the excluſive privilege of the corporation of wrights. A wright can only make the wooden part; the cutting of the cloth belongs to the taylor-craft; and the preparing the nails, ſcrews, and hammers, belongs to the craft of hammermen. A work which requires the intervention of ſo many different crafts, cannot be peculiar to any one corporation. And, accordingly, the profeſſion of *undertakers* has been eſtabliſhed, whoſe province it is to take the whole management of funerals, to employ the different craftſmen, and to provide every neceſſary article; but it cannot be ſaid that *undertakers* are bound to enter with any particular craft.

The Lords ' ſuſpended the letters *ſimpliciter*.'

Nota. It was objected, in the beginning of the proceedings, that the corporation had not produced their ſeals of cauſe; but this objection was paſſed from, it being admitted that the corporation had been long eſtabliſhed and acknowledged as ſuch; ſo that, even without a ſeal of cauſe, their privilege would be ſupported by preſcription.

G. F.

For the Chargers, *Lockhart, Coſmo Gordon.*
Alt. *Montgomery, Sir Dav. Dalrymple, W. Stewart.* Clerk, *Pringle,*

No. VIII. *March* 8. 1765.

JAMES DENHAM;

Againſt

WILLIAM DENHAM.

HEIR AND EXECUTOR.

Relief betwixt Heir and Executor.

JAMES DENHAM, joiner in London, diſponed the lands of Birthwood to James Denham his nephew. He alſo diſponed part of his perſonal eſtate to the ſecond ſon of James, and the reſidue to James himſelf, under the burden of his debts and legacies, which were all cleared off by James, except a legacy of L. 100 Sterling due to one perſon, and an annuity of L. 12 Sterling due to another.

After

After the uncle's death, James diſponed the lands of Birthwood to his eldeſt ſon William, with warrandice from his own proper facts and deeds; and power to burden them with any ſum not exceeding 16000 merks.

James exerciſed the faculty, by diſponing the lands, to the extent of the 16000 merks, to a truſtee for his wife and younger children, declaring that the truſtee ſhould be bound, 'in the firſt place, to pay all his 'juſt and lawful debts, which ſhould be owing by him at his death, in 'ſo far as the ſaid William Denham, by his acceptation of the foreſaid 'diſpoſitions, ſhall not be found liable or obliged to pay the ſame.'

Upon James the father's death, the queſtion occurred, whether William, the eldeſt ſon, was intitled to relief out of the 16000 merks, with which the lands were burdened, of the legacy of L. 100 and annuity of L. 12, which ſtill remained due?

Pleaded by the truſtee: Nothing can be inferred from the obligation to pay ſuch debts as the heir ſhould not be found liable for; but, that the teſtator was deſirous that juſtice ſhould be done to his creditors, leaving the right of mutual relief among his repreſentatives to the direction of law; but, by law, the heir is liable for his father's debts, as having poſſeſſed the eſtate *praeceptione haereditatis*, in virtue of a gratuitous conveyance.

Nor is the heir intitled to found upon the obligation of warrandice in the diſpoſition. So it has been found with regard to debts contracted by the father himſelf, 11th December 1679, creditors of Mouſewal *contra* the children. And it muſt hold, *a fortiori*, in the caſe where the debts, being legacies impoſed by James the uncle, can, in no ſenſe, be conſidered as ariſing from the fact and deed of James the father.

Anſwered for the heir: Though he is liable to the *creditors praeceptione haereditatis*, that makes no difference in the queſtion between him and the chargers, who are no leſs liable for payment of the debts. Theſe debts were burdens impoſed by James the uncle, who, when he had it in his power to lay them upon the lands of Birthwood, declared them to be burdens upon his perſonal eſtate; and James the father made no alteration in that reſpect.

The diſpoſition of his eſtate would have been eluſory, had the father retained the power of burdening it without limitation; the extent, therefore, was ſpecified, to which the lands might be burdened; all farther burdens were guarded againſt by the clauſe of warrandice, which ought to ſecure even againſt the debts left by James the uncle, as it was the fault of the father that they were not paid; at any rate, the clauſe of warrandice would not have been inſerted, had it not been intended that William ſhould receive the eſtate free of any burden beyond the 16000 merks.

'The Lords found, that William Denham is intitled to be relieved of 'the annuity of L. 12, and the legacy of L. 100 Sterling; and 'that the executry of the deceaſed James Denham is liable, in the 'firſt place, for the ſaid ſums, and the ſum of 16000 merks liable 'for the ſaid debts only in the ſecond place; and that William

'Denham

'Denham is intitled to retain that ſum to the value of the ſaid two 'debts.'

G. F.

For the Charger, *Miller* Advocatus, *Wight*. Alt. *Lockhart*, *Rae*.

No. IX. *June* 20. 1765.

EARL of MORTON;

Againſt

SOMMERVILLE.

POINDING OF UNRIPE CORNS

Not complete till they are threſhed and meaſured.

GEORGE SOMMERVILLE being creditor to Alexander Ranken, a tenant of the Earl of Morton's, in two different ſums, executed two poindings of his growing corns upon the 2d and 14th of June 1763.

The Earl of Morton having brought an action againſt Ranken for his rents 1760, 1761, 1762, and 1763, applied for a ſequeſtration of the whole growing corns, which was granted, and executed upon the 3d of June; and an arreſtment laid by his Lordſhip, in the hands of the ſheriff-clerk, on the ſame day.

Upon the 16th of June, the Earl recovered decree for the rents; and, upon Ranken's death, which happened ſoon after, brought an action of forthcoming, in which he called his repreſentatives.

Afterwards, he obtained a warrant from the ſheriff for ſelling the corns by auction, which was carried into execution upon the 30th of Auguſt, the corns being actually ſold, and the prices paid in to the ſheriff-clerk, notwithſtanding a proteſt taken by Sommerville, that theſe ſteps ſhould not hurt his poinding, or prevent him from aſcertaining the quantity, by threſhing and meaſuring the corns when they ſhould be cut down.

In the forthcoming, the ſheriff preferred the Earl of Morton; and Sommerville advocated the cauſe.

Pleaded for Sommerville: To found a ſequeſtration, it is neceſſary that the ſubject be in court, and affected by different claimants; but the Earl of Morton had uſed no diligence for affecting the growing corns; and, therefore, the ſheriff ought not to have ſequeſtrated them, eſpecially as the current rent was fully ſecured by the hypothec.

But,

But, allowing the proceedings to have been regular, the ſequeſtration could go no farther than to ſecure the effects from embezzlement, for the benefit of all parties having intereſt; it could not transfer the property, or bar the diligence of creditors. And the arreſtment, an inchoated diligence, could not compete with a poinding.

Anſwered for the Earl: Originally, the tenants corns could be taken in execution for the debt of the maſter, who ſtill retains his intereſt, ſo far as that they are hypothecated for his rent; ſequeſtration is a ſummary remedy, intended to enable the maſter to operate his payment, and muſt have the effect to exclude all others from uſing diligence.

Whatever might be the effect of a poinding in competition with an arreſtment, no preference can be pleaded on the poindings in the preſent caſe. becauſe they were irregular in ſeveral reſpects.

For, 1*mo*, Poinding could not be executed with effect, after the ſequeſtration.

2*do*, Though it is now eſtabliſhed, that growing corns may be poinded, yet that is only to be underſtood of corns come to ſuch a degree of maturity, as that a judgment may be formed of their value; elſe the two appriſements would be eluſory, and the debtor expoſed to have effects diſpoſed of, far above the amount of the debt.

3*tio*, The poindings never were completed, the common debtor having died before the corns were cut down; and conſequently before they could be threſhed out or meaſured.

And, upon this head, it was obſerved, that poinding is a judicial ſale for payment of the debt, in which ſeveral regulations are laid down to ſecure againſt the rapacity of creditors: Thus, it is required that the goods be valued two different times, and by different appretiators: That the poinding ſhall not proceed to a greater extent than the amount of the debt, at leaſt that the ſurplus be reſtored: That the goods be offered back to the debtor at the appriſed value; and only adjudged to the creditor upon his refuſing to take them at that rate.

But none of theſe regulations can take place in the poinding of growing corns, if it ſhall be held to be completed before they are threſhed and meaſured. In that view, the ſecond appretiation is no check upon the firſt; for no man can form a judgment upon a handful of unripe ſtalks carried to the market-place: The meſſenger cannot proportion the goods poinded to the debt, becauſe the value cannot be known with any degree of certainty; nor can the debtor redeem at the appriſed value, ſince he can neither foreſee the quantity which will be produced, nor aſcertain the value of it.

Hence it follows, that a poinding of growing corns is not complete, and conſequently does not tranſter the property, till after the threſhing and meaſurement; and ſo the court ſeems to have viewed the matter in the caſe, 24th November 1677, Lord Hatton ſupplicant, where, in laying down the rules to be followed in poindings of this kind, they in particular directed the threſhing and meaſuring of the corns as a neceſſary ſtep; and, in the caſe, November 1688, Skene *contra* Ld Carlourie, obſerved by Harcarſe, *voce*, *Poinding*, they expreſsly found a poinding incomplete, where that ſolemnity had been omitted.

Since then, the property was not transferred while the common debtor lived, the diligence cannot be completed after his death ; and things muſt remain in the ſituation he left them, till titles be made up by the heir or by a creditor.

Replied for Sommerville: The form uſed in poindings, and which is the ſame in poinding growing corns, as in other caſes, neceſſarily implies that the property is transferred before the meaſurement is practicable. The meſſenger offers the ſubject back to the debtor at the appriſed value, which would be abſurd, unleſs he had alſo power to transfer the property to the creditor.

The after meaſurement is not *de eſſentia* of the poinding ; it is neceſſary, indeed, for aſcertaining the preciſe quantity ; but the property is veſted at the beginning, by the ſentence of the meſſenger ; Bankt. IV. 41. 4.; Forbes, 11th March 1707, Erſkine *contra* Boſwal.

Upon theſe principles, the firſt poinder was preferred, though another had got the ſtart of him in threſhing and meaſuring ; 22d December 1698, Cathcart *contra* Paton ; June 1727, M'Whirter *contra* Hamilton.

It is not a clear point that the debtor could retain the corns upon an offer of the debt, at any time previous to the meaſurement ; as the creditor runs the riſk of the fall of the markets, perhaps he might be found intitled to the benefit of their riſe. But, whatever may be in that, there is no difficulty in ſuppoſing the property to be transferred, in the ſame manner as in an adjudication, during the courſe of the legal, or in a ſale under reverſion, while the term is unexpired ; indeed, the caſe is preciſely ſimilar to a voluntary ſale of growing corns made by a ſample, and completed by ſymbolical delivery.

But, though it ſhould be held that the property is not fully transferred, till after the meaſurement, ſtill the poinding may be completed by that ſolemnity, even after the death of the common debtor.

An adjudication does not diveſt the debtor till infeftment be taken ; but an adjudger may infeft himſelf after his debtor's death. An arreſtment does not carry the ſubject, without a decreet of forthcoming ; yet forthcoming may be purſued, after the death of the common debtor. An aſſignation is not effectual without intimation ; but the death of the cedent does not preclude the aſſignee from completing his right.

And there is a material diſtinction between the caſe where there is a perſonal concluſion againſt the debtor, and where no more is in view than to affect his ſubjects. An arreſtment infers nothing perſonal againſt the debtor ; and, therefore, forthcoming may be purſued, notwithſtanding his death. The ſame obſervation may be applied to poindings of the ground ; and, as the reaſon is the ſame in perſonal poindings, the law cannot be different.

Duplied for the Earl: There is ſome degree of impropriety in the meſſenger's offering back the poinded corns to the debtor, before the value can be aſcertained, and, indeed, before he is finally diveſted of the property ; but this practice has been adopted by meſſengers from the uſage in other poindings, without attending to the meaning of it.

It

It is not unreaſonable that a preference ſhould be given to the creditor who has firſt begun to take the effects of the debtor in execution, by having them appretiated while on the ground, if he be not in any culpable *mora* of completing the poinding by meaſurement; but it does not follow that the property is transferred by that preliminary ſtep.

And there is a clear fallacy in the examples which are adduced of adjudications completed by infeftment, arreſtments followed by forthcoming, and poindings of the ground put in execution after the death of the debtor. In theſe caſes, every thing was complete, ſo far as reſpected the debtor. In the firſt, the ſale is completed by the decree of adjudication; the arreſtment is a completed diligence *in ſuo genere*; and the poinding of the ground, when once obtained, is followed out againſt the lands without regard to the proprietor.

The Lords 'advocated the cauſe; found the ſequeſtration and arreſtment inept, except in ſo far as concerns the hypothec; repelled the objection to the poinding on account of the immaturity of the corns poinded, at the time of the poinding; and found that the ſame was competent in the month of June, and the poinding thereby lawfully inchoated.'

Memorials were ordered upon the point how far the poindings could be completed after the death of the debtor.

The ſubſtance of theſe memorials has been already ſtated; and, upon adviſing them, the Lords 'found, that George Sommerville can have no 'preference by his poindings.'

This interlocutor proceeded entirely on the footing, that the poinding was only *inchoated* in June, and that it could not be *completed* after the death of the common debtor.

G. F.

Act. *Montgomery.* Alt. *Wight.*

No. X.

No. X. *June* 21. 1763.

Sir THOMAS GORDON;

Againſt

JAMES MURRAT of Broughton.

WRIT

Not bearing in the teſting Clauſe to be ſubſcribed by the Granter.—Subſcribed without his Chriſtian Name.—Notorial Docquets.

NATHANIEL GORDON ſerved heir male and of proviſion in general, to the eſtate of Carleton, with a reference to the clauſes of the entail, and diſponed the lands to Alexander his ſon in fee ſimple.

Alexander Gordon ſold the eſtate by minute of ſale to Alexander Murray of Broughton, who led an adjudication, in implement, and alſo in ſecurity of ſundry debts, on which he was infeft.

Sir Thomas Gordon of Earlſton, the next ſubſtitute to Alexander, purſued a declarator of irritancy, for having it declared that Nathaniel and Alexander Gordons had irritated their rights for themſelves and their deſcendents.

Compearance was made for James Murray, now of Broughton, who pleaded, *inter alia*, that Nathaniel Gordon had right to the eſtate, independent of the tailzie, by expired adjudications.

One of the adjudications acquired by Nathaniel Gordon was led by George Fullerton of Dreghorn, for the accumulated ſum of L. 2445 : 3 : 4 Scots.

The teſting clauſe of ſeveral of the grounds of debt on which this adjudication proceeded, was thus expreſſed:

'In witneſs whereof thir preſents, written by Alexander Cairns notar 'at the burgh of Galloway, the 24th day of Auguſt 1669 years, before 'theſe witneſſes.'

Objected: There are here no words importing that the deed was ſubſcribed by the granter.

Anſwered: Who the granter was, ſufficiently appears from the deed, which is ſubſcribed by him. The writer and witneſſes are deſigned, and the witneſſes ſubſcribe, which is all that the law requires.

'The Lords repelled the objection.'

The conveyance of one of the grounds of debt, in the ſame adjudication, was ſubſcribed by notaries, with the following docquets:

'John

'John Gordon nottar-public, at command of the above named Ma-'rion Macgarmorie, with her hand at the pen, affirming ſhe cannot 'write, be this my ſubſcription. (Signed) JOHN GORDON. *Ita eſt* '*Joannes Calendar notarius publicus, ac co-notarius in praemiſſa requi-*'*ſitus.*'

Objected: 1. The *firſt* docquet is informal, as neither certifying that the notary ſubſcribed for the party, nor that he had a mandate from her for that purpoſe. 2. The *ſecond* docquet is improbative, as not ſubſcribed.

Anſwered: 1. There is no particular ſtile required in theſe docquets; and, it is ſufficient, if it appear that the notary authenticated the deed at the deſire of the party. 2. The docquets of notaries do not require to be ſubſcribed.

'The Lords repelled the objections.'

It was farther *objected* to the ſame conveyance, that, though it is ſubſcribed by two notaries, there are only *three* ſubſcribing witneſſes.

'The Lords ſuſtained this objection, in ſo far as the debt conveyed 'exceeds the ſum of L. 100 Scots.'

The aſſignation by George Fullerton of Dreghorn to Nathaniel Gordon was ſubſcribed, *Fullerton of that Ilk*, without his Chriſtian name.

Objected: This is no ſubſcription. The act 1672, c. 21. requires all, except noblemen and biſhops, 'to ſubſcribe by their chriſtened names, or 'the initial letters thereof, with their ſirnames;' adding, that 'they may 'adject the deſignations of their lands, prefixing the word *of* to ſaid de-'ſignations.' This may juſtify the addition of *that Ilk*, but cannot juſtify the want of the Chriſtian name.

Anſwered: The ſtatute does not annul ſubſcriptions contrary to its directions; but ſubjects the contraveeners to puniſhment by the privy council.

'The Lords repelled the objection.'

G. F.

Act. *Lockhart, Wa. Stewart, H. Dundas.* Alt. *Ferguſon, Montgomery, Macqueen.*
Reporter, *Coalſton.* Clerk, *Kirkpatrick.*

No. XI. *June* 26. 1765.

Sir WILLIAM HAMILTON of Weſt-port;

Againſt

MARY DE GARES, alias *BONAMY*, *and MARY BURTON-HAMILTON.*

PACTUM ILLICITUM.

Bond of Annuity granted to a Woman living in a State of Adultery with the Granter, granted to her Daughter.

SIR James Hamilton of Weſt-port granted an heritable bond of annuity, for L. 40 Sterling, to Mary de Gares, *alias* Bonamy, of the iſland of Guernſey, the wife of John Bonamy of that iſland. He granted a like bond for L. 20 *per annum*, to increaſe to L. 30, upon the death of her mother, to Mary Burton *alias* Hamilton, the daughter of Mary de Gares, by Sir James himſelf, as was ſuppoſed.

Upon the death of Sir James, the eſtate of Weſt-port devolved on his nephew by a ſiſter, William Ferrier, ſon of John Ferrier writer in Linlithgow, who aſſumed the name of Sir William Hamilton.

Actions were brought by Mary de Gares and her daughter for payment of their annuities; and Sir William inſiſted in a reduction, upon the ground that the bonds were null, as granted *cauſa adulterii*, and, therefore, *ob turpem cauſam.*

Anſwered for Mary de Gares: There is no evidence of any *turpis cauſa*; the bond bears to be granted for good and weighty reaſons, and onerous conſiderations. And, allowing it to be true, that Mary de Gares lived in adultery with Sir James, it does not follow that the bond was granted on that account. It was not given as an inducement to her to leave her huſband, for it was granted long after ſhe had left him, and probably with a view of putting an end to the connexion. At any rate, the rule of the law is clear, 'Turpiter facere quod ſit meretrix; non turpiter 'accipere, cum ſit meretrix;' l. 4. § 3. *D. de Condict. ob turp. cauſ.* The firſt violation of her chaſtity is an act of turpitude; but, after having taken that fatal ſtep, there is no longer any turpitude in her receiving the wages of proſtitution, which is now perhaps her only reſource.

The law is ſtill clearer, in the caſe of a bond of annuity granted to a woman in that unhappy ſituation; by placing her in a ſtate of independence, it gives leiſure for reflection and repentance, and puts it in her power once more to return to a life of decency and virtue. Inſtead, therefore, of being reprobated, ſuch obligations ought to be favoured by the

the law; and, accordingly, a bond of this kind was ſuſtained, 25th June 1642, Roſs *contra* Robertſon; a deciſion the more remarkable, that it was pronounced at ſo early a period, when leſs indulgence was ſhown to the *delicta carnis* than may be expected now.

Anſwered for Mary Burton-Hamilton: The ſuppoſed *turpis cauſa* cannot apply to her. The preſumption is, that ſhe was the daughter of the huſband of Mary de Gares: Pater eſt quem nuptiae demonſtrant. But, ſuppoſing her to be the daughter of Sir James, it not only was not unlawful to provide for her, but he was under an obligation to do it. See 7th March 1707, Irving *contra* Skene.

Replied: It is not denied that Mary de Gares left her huſband, and lived in adultery with Sir James. And it will be difficult to aſſign any other reaſon for the large proviſions which he made to her and her daughter; indeed, the thing is clear from the words of the bond to the daughter, where Sir James gives her his own name, at the ſame time that he deſigns her as the daughter of Mary de Gares.

There is no difference between a previous corrupt bargain, and a reward given *ex poſt facto*; the cauſe is ſtill the ſame. And though, where a young woman is ſeduced and robbed of her virginity, ſhe may perhaps have action for any gift made to her by the ſeducer, as indeed ſhe is intitled to damages at common law; yet, the caſe of a married woman living in adultery is different, her guilt being at leaſt equal to that of the perſon with whom ſhe lives.

The quotation from the civil law does not apply, being confined to the caſe of a common whore, who is ſuch by profeſſion; and, even in that caſe, it would ſeem, that, though there is no *condictio* for repetition of what is given to a whore, yet ſhe has no action for payment. In pari caſu melior eſt conditio poſſidentis. So Perezius lays down the law in his commentary upon the title of the Code *de condictione ob turp. cauſ.* Voet, under that title of the Pandects, *num. ult.* gives a clear opinion that no action lies. And, upon theſe principles, a bond, ſimilar to that now in queſtion, was found not actionable, either at the inſtance of the mother or of the child; 20th July 1622, Weir *contra* Durham.

If this defence would be ſuſtained in favour of the party himſelf, becauſe his turpitude is no greater than that of the purſuer, much more muſt it be available to his heir, who is altogether innocent.

The Lords found, ‘ that no action can lie upon the bond granted to ‘ Mary de Gares, in reſpect it was granted *ob turpem cauſam*; and ‘ reduced, aſſoilzied, decerned, and declared accordingly: But ‘ repelled the reaſons of reduction and defences againſt the bond ‘ granted to Mary Burton-Hamilton, and decerned.’

G. F.

Act. *Ilay Campbell.* Alt. *Lockhart, Croſbie.*

No. XII.

No. XII. *June* 27. 1765.

BUCHANAN;

Againſt

DUNCAN.

WRIT.

Bill of Exchange accepted by two Notaries for the Party, without Witneſſes.

AN action was brought for payment of a bill for 300 merks, accepted by two notaries for the party, now deceaſed, their ſubſcription not being atteſted by witneſſes.

Objected by the defender: 1*ſt*, A bill of exchange cannot be accepted by notaries for the party. 2*d*, The ſubſcription of notaries can, in no caſe, be ſuſtained without witneſſes.

Anſwered for the purſuer: 1*ſt*, A bill, ſigned by a notary for the party, was ſuſtained, 28th June 1737, Dinwoodie *contra* Johnſton. 2*d*, From the favour of commerce, bills are exempted from the ſolemnities required in other deeds; and, as they may be ſubſcribed by notaries, as well as other writings, ſo the ſubſcription of the notary, coming in place of the ſubſcription of the party, witneſſes are not required to ſupport a bill ſubſcribed by notaries, more than they are required, when the bill is ſubſcribed by the party himſelf.

Replied: In the caſe of Dinwoodie, the bill was ſuſtained in reſpect of the acknowledgement of the accepter, who was alive, and did not deny that he had authoriſed the notary to ſign for him. And a bill of exchange, ſubſcribed by notaries, cannot be ſuſtained, without ſuch an acknowledgement; for in all deeds ſubſcribed by notaries, the writer and witneſſes muſt be inſerted in the deed; but this cannot be done in bills of exchange, which are not excepted from the common rule, either by the ſtatute law, or by any lawyer who has treated of the ſubject.

The Lords 'ſuſtained the objection to the bill in queſtion, that it is 'void as being ſigned only by two notaries, without witneſſes; and, 'therefore, aſſoilzied the defender, and decerned.'

G. F.

Act. *James Dundas.* Alt. *John Dalrymple.* Clerk, *Roſs.* Reporter, *Auchinleck.*

No. XIII.

No. XIII. *June* 28. 1765.

Sir THOMAS BURNET *of Leys*;

Againſt

GEORGE *and* ALEXANDER BURNET, *Elder and Younger of Kemnay.*

SUCCESSION.

What underſtood by the Term Heirs whatſoever?

THE eſtate of Leys ſtood deviſed to heirs-male.

In 1733, Sir Alexander Burnet diſponed the lands of Standingſtanes, a part of the eſtate, to George Skene of Skene, for the purpoſe of creating a freehold qualification; and, the end having been ſerved, Skene rediſponed to Sir Alexander, *his heirs and aſſignees.*

In 1740, Sir Alexander diſponed his lands and manor-place of Crathes, to his only ſon Robert, *his heirs and aſſignees*, in fee.

In 1746, Sir Alexander, in the view of creating a freehold qualification to his ſon, diſponed the lands of Standingſtanes to him, *his heirs and aſſignees*, reſerving his liferent, and power to ſell or burden; and aſſigned him to the unexecuted procuratory in Skene's diſpoſition, on which he took infeftment.

In 1754, Sir Alexander cancelled the diſpoſition of the lands of Crathes, and renounced his reſerved powers over thoſe of Standingſtanes, in favour of Robert, *his heirs and aſſignees* whatſoever.

Upon his father's death, Robert made up titles by ſervice, as heir male and of line.

In 1759, Sir Robert, in order to give a freehold qualification to Alexander Burnet, younger of Kemnay, his nephew, diſponed the ſame lands of Standingſtanes to him, his heirs, and aſſignees. It was concerted, that a backbond ſhould be granted by Kemnay elder, for rediſponing the property, to be held of Alexander during his life, for L. 1 : 10 : 0 Scots of feu-duty. This back-bond was extended in favour of Sir Robert, and his heir ſucceeding to him in his other lands and eſtate; but it never was ſigned, Sir Robert having died ſoon after the tranſaction.

However, within ſeven days of his death, he ſigned a mandate to his doer to deliver up the diſpoſition to Kemnay elder, for behoof of his ſon, declaring that, in the event of his death, Alexander ſhould have the benefit of the diſpoſition, and that, in that event, 'there is neither re-diſpo-
' ſition, nor back-bond granted, or to be granted.'

Upon Sir Robert's death, Sir Thomas Burnet, formerly of Criggie, now of Leys, the heir-male, brought a proceſs for having it found, that Sir Alexander and Sir Robert had neither altered, nor intended to alter the inveſtitures of the lands of Standingſtanes, from heirs male to heirs of line: That the *property* of thoſe lands was a truſt in the perſon of Alexander, and that he ought to re-diſpone it, to be held of himſelf during his life, for payment of L. 1 : 10 : 0 Scots of feu-duty; he alſo inſiſted in a reduction of the mandate *ex capite lecti*.

The defenders admitted that no alteration was made by Skene's rediſpoſition; that the mandate was granted on death-bed; and that the property of Standingſtanes was a truſt in Alexander, for behoof of Sir Robert and his *heirs*.

The queſtion, therefore, came upon the conſtruction of the former deeds, who was the *heir* intitled to the benefit of the truſt, the heir-male, or the heir of line?

Pleaded for the defenders: 1*mo*, The diſpoſition 1746 had the effect to veſt the lands of Standingſtanes in Sir Robert, deſcendible to his heirs of line.

It makes no difference that the diſpoſition was intended for giving Sir Robert a freehold qualification in the county, or that he was the heir *alioqui ſucceſſurus*; in either view, a new fee was created; and, whatever interpretation may have been given to the term *heirs whatſoever* in acceſſory conveyances, the heir of line is always underſtood in original rights. The eſtabliſhed form of altering the deſtination of an eſtate is by reſignation for new infeftment, in favour of a different ſeries of heirs.

2*do*, Were *intention* to be the rule in this queſtion, the tranſaction 1754 ſhows that Sir Alexander intended that the lands of Standingſtanes ſhould deſcend to the heirs of line. The renunciation of Sir Alexander's reſerved powers over thoſe lands, came in place of the diſpoſition of the lands of Crathes, which were plainly meant to go in that channel.

3*tio*, No argument can be founded on the terms of the back-bond, which never was ſigned, and conſequently could not alter the inveſtitures of the eſtate, though it were allowed to be a proper deed for that purpoſe.

Anſwered, to the 1*ſt*: In a diſpoſition to a ſtranger, and his *heirs whatſoever*, the heir of line muſt neceſſarily be underſtood, if there be no circumſtances by which any other heir can be implied; but, in a diſpoſition to the heir *alioqui ſucceſſurus*, the term has no fixed determinate meaning in law. It is applicable to all different kinds of heirs *ſecundum ſubjectam materiam*, as is evident from a variety of caſes which are to be found, Dictionary, *Succeſſion*, p. 401. and from many others, as Edgar, 31ſt July 1725, Skene *contra* Skene; 7th February 1745, Weir *contra* Steil; 2d March 1756, Farquharſons *contra* Farquharſon; 12th January 1757, Maclauchlan *contra* Campbell.

No intention of altering the order of ſucceſſion can be inferred from a clauſe of that kind thrown into a deed, which was not meant for a ſettlement of the eſtate, but for a quite different purpoſe. The deed 1746, was deſigned for giving Sir Robert a freehold qualification, and cannot have

have the effect of altering the ſucceſſion, more than the re-diſpoſition by Skene, which is admitted to have no ſuch effect.

To the 2*d*: The renunciation 1754, was intended for no other purpoſe than to provide for an *interim* aliment for the heir, and could not be meant as an alteration of the ſucceſſion. It is far from being clear that the diſpoſition 1740, would have carried the lands of Crathes, with the manſion-houſe of the family, to the heir of line, while the reſt of the eſtate was deviſed to heirs-male. In that view, the deed would have been irrational; and, therefore, Sir Alexander muſt have been preſumed to have intended to tranſmit thoſe lands to the heir of the inveſtitures. But, ſuppoſing that deed to have had a contrary effect, Sir Alexander may have changed his intention between the 1740 and 1754; ſo that there is no arguing from the one deed to the other.

To the 3*d*: The purſuer does not found on the back-bond as an alteration of the ſucceſſion; but only as a circumſtance to ſhow that Sir Robert the diſponee did not underſtand, that, by any of the former deeds, the lands of Standingſtanes had been ſet into a different channel of ſucceſſion from the reſt of the eſtate.

The Lords 'found, that the property of the lands of Standingſtanes 'was a truſt in the perſon of Alexander Burnet, and that he muſt 're-convey it to the purſuer, and his heirs ſucceeding him in the 'barony of Leys, to be holden of the ſaid Alexander during his 'life, for payment of L. 1 : 10 : 0 Scots of feu-duty; and, after 'his death, to be conſolidated with the ſuperiority, in the perſon of 'the purſuer, and his heirs ſucceeding him in the ſaid barony.'

G. F.]

Act. *Macqueen, Sir David Dalrymple.* Alt. *Miller* Advocatus, *Montgomery.*
Reporter, *Kennet.*

No. XIV. *November* 13. 1765.

HENRY WALKER;

Againſt

SPENCE and CARFRAE.

If One purchaſing cattle, bona fide, *and ſelling or ſlaughtering them before Action, is liable to the real Owner?*

HENRY WALKER, ſtabler in Edinburgh, had ſent a parcel of ſheep to John Spence, to be grazed at a certain ſum for graſs mail. John Spence ſold theſe ſheep as his own, partly to William Spence butcher in Muſſelburgh, who paid ready money, and ſlaughtered and ſold them

them in the public market; and partly to Carfrae, who likewiſe had paid the price, and diſpoſed of them before any action was commenced.

Henry Walker brought an action againſt Spence and Carfrae, and *pleaded*, That no man's property can be taken from him, and transferred to another, without his conſent, except by legal diligence, to which he is ſuppoſed to conſent, by contracting the obligation on which it proceeds; and, therefore, it may juſtly be doubted, though the defenders could plead *bona fides* in the purchaſe, if that would protect them from reſtoring the ſheep or their value to the lawful proprietor. It is certain, if they were ſtill in their poſſeſſion, it would be no good defence againſt reſtitution, that they bought them *bona fide*, for *rem meam vindicare poſſum ubicumque inveniam*. Indeed, if they had ſold them to another perſon, *bona fide*, no action would lie againſt them, but againſt the poſſeſſor; but, where the purchaſer has ſlaughtered and conſumed the ſheep, the purſuer apprehends, the action does properly lie againſt him. If a perſon purchaſes corns, and pays the price, *bona fide*, he is nevertheleſs liable to the landlord, in virtue of his right of hypothec; and, if this holds in a right of hypothec, it muſt much more hold in a right of property; for it is impoſſible that a right of hypothec ſhould have ſtronger effects than a right of property.

Anſwered for the defenders: Suppoſing the property of the ſheep did actually belong to the purſuer, yet they fall to be aſſoilzied upon the principle laid down by the purſuer, That, if the goods are both bought and ſold to another *bona fide*, action lies only againſt the poſſeſſor. Now, that the defenders were *in bona fide* to purchaſe theſe ſheep from John Spence, is clear from this, that they were in his cuſtody and uſed as his property; for he had diſpoſed of the lambs and wool as his own, without any challenge from Walker: Theſe were ſuch deliberate acts of property, as left the defenders no reaſon to doubt that they were really his own, and that he was intitled to diſpoſe of them; and, conſequently, they were *in bona fide* to purchaſe them; nor can it be ſaid, that either of the defenders *dolo deſiit poſſidere*. See Lord Stair, lib. 1. tit. 7. § 10. and 11.; Lord Bankton, lib. 1. tit. 8. § 11.; and Scot *contra* Low, 15th June 1704, obſerved by Preſident Dalrymple.

'The Lords found it proven, that the ſheep libelled were ſent by the 'purſuer to be grazed on the farm of Sauchinſide, poſſeſſed by 'the deceaſed John Spence as tenant; and that the graſs mail was 'paid by him: Found, that the ſaid ſheep were purchaſed *bona* '*fide*, by the defenders, from the ſaid John Spence, and the price 'paid at the time of delivery: Found it not proved, that the 'defenders were in the knowledge that the property of the ſheep 'did belong to the purſuer; and therefore, and in reſpect that the 'ſheep ſo bought by the defenders, had been ſold or ſlaughtered 'by them, before citation in this proceſs, and that it is not proved 'that the defenders, or either of them, were gainers by the tran-'ſaction, aſſoilzied the defenders.'

C. B.

Act. *James Dundas*. Alt. *Dav. Dalrymple*, jun.

No. XV.

No. XV. *November* 13. 1765.

MORE and IRVINE;

Againſt

STEVEN.

PACTUM ILLICITUM.

If Action lies at the Inſtance of a foreign Merchant, for the Price of prohibited goods ſeized on the Paſſage?

STEVEN, merchant at Newtyle, having commiſſioned a quantity of tea, brandy, &c. from More and Irvine merchants at Gottenburgh, to be ſhipped on board the firſt Swediſh veſſel bound to the coaſt of Scotland between Ythan and Peterhead, the veſſel was driven, by ſtreſs of weather, into the Frith of Forth, where it was ſeized, and afterwards condemned in the court of Exchequer; and, in the trial, More and Irvine appeared and claimed the cargo as their property.

It was *pleaded* for Steven, in a ſuſpenſion of a charge for payment of the price: 1*mo*, As this was a bargain entered into by ſubjects of this kingdom, for the importation of goods, which the contracters well knew were prohibited to be imported, it was *pactum illicitum*, on which no action ought to lie; and it would be expedient to refuſe action, as that would be a means of diſcouraging ſmuggling.

2*do*, The conditions of the commiſſion had not been obſerved, as the ſhip, inſtead of touching at the part of the coaſt directed, had come into the Frith of Forth, where it was ſeized.

3*tio*, The chargers, by claiming the cargo as their property, ſhowed they did not underſtand the commiſſion to have been properly implemented.

Anſwered to the 1*ſt* defence: Though, by ſpecial ſtatute, the goods in queſtion are, in certain circumſtances, put *extra commercium* in this country, yet they are, *jure gentium*, of free commerce at Gottenburgh, from whence they were commiſſioned. The prohibitory enactments of theſe ſtatutes can have no force at Gottenburgh, or any place beyond the juriſdiction of the Britiſh legiſlature; perſons reſiding in a country ſubject to different laws, are not preſumed to know or attend to the various laws enacted in this country for regulating ſuch matters; nor are they obliged to inquire, whether the purchaſers are to enter the goods or not, but, as factors, muſt anſwer ſuch commiſſions as are ſent them. The diſmiſſion of this action would not have the effect of diſcouraging

 ſmuggling;

ſmuggling; it would only change the courſe of the trade, and throw the whle of it into the hands of foreigners, who would only deal for ready money. See Lord Bankton, v. 1. p. 413. § 16. and 27th November 1723, Commiſſioners of the cuſtoms *contra* Moriſon; 27th February 1757, Walker *contra* Falconer.

To the 2*d*: The goods were ſhipped on board a Swediſh ſhip, bound to that part of the coaſt of Scotland where they were directed to be ſent, though the veſſel was driven, by ſtreſs of weather, into the Frith of Forth. Foreign factors, or merchants, are always underſtood to have fully implemented their commiſſion, ſo ſoon as they have ſhipped the goods commiſſioned, agreeably to the directions of their conſtituents.

And, as to the 3*d* defence: It was obſerved, that it was uſual for the foreign merchant to claim the goods in the court of exchequer, in order, if poſſible, to ſave them from condemnation.

'The Lords repelled the reaſons of ſuſpenſion; found the letters or-
'derly proceeded, and expences due.'

C. B.

No XVI. *November* 13. 1765.

ARCHIBALD CAMPBELL;

Againſt

JAMES YATES.

PROOF

——*of furniſhing after three Years.*

IN an action for the price of a quantity of porter, the defender allowed decree to go in abſence before the ſheriff. The charge having been ſuſpended, and the furniſhing denied, a proof was led, in which two witneſſes deponed to the furniſhing, and that it was ſtated in the charger's books accordingly.

Pleaded for the ſuſpender: The accompt is preſcribed *quoad modum probandi*, and it is incumbent upon the charger to prove reſting owing, by writing or oath.

Anſwered: The triennial preſcription does not operate *ipſo jure*. It only affords an exception, which ought to have been pleaded before the

the ſheriff; or, at leaſt, ſtated in the ſuſpenſion, before the proof was taken.

2*do*, The ſuſpender does not plead payment, but denies the delivery, a defence inconſiſtent with payment. And, however a proof of *reſting owing* might have been incompetent by parole-evidence, the *delivery* may be proved in that manner. Accordingly, it has been ſo proved, and reſting owing muſt be implied from the denial of delivery; for the ſuſpender cannot be allowed to alledge payment of articles, which he has affirmed were never delivered.

'The Lords found the articles ſufficiently proved by the teſtimonies 'of the witneſſes, referring to the charger's books.'

G. F.

Act. *Lockhart.* Alt. *Croſbie.*

No. XVII. *November* 14. 1765.

ROBERT IRELAND;

Againſt

ALEXANDER GOVAN.

HEIR-PORTIONER.

If the eldeſt Siſter is intitled to the principal Meſſuage as a Praecipuum? *If the younger Siſters are intitled to a Recompenſe?*

THE lands of Mains of Eaſtwood, containing about 150 acres, and worth about L. 35 Sterling *per annum*, having fallen to four heirs-portioners, Alexander Govan, as in the right of the eldeſt ſiſter, brought an action, for dividing the lands, againſt Robert Ireland, as in the right of the other three ſiſters.

It was *argued* for the younger ſiſters, on the firſt point, 1*mo*, There are here no *termini habiles* for the principal meſſuage going to the eldeſt ſiſter as a *praecipuum*; becauſe the manſion-houſe is neither a tower nor fortalice, which alone, as carrying along with them an idea of honour, are conſidered as indiviſible; and, therefore, fall to the eldeſt ſiſter as a *praecipuum*. See Craig, lib. 2. dieg. 8. § 3.; Stair, lib. 3. tit. 5. § 11.; and M'Kenzie's inſtitute, lib. 3. tit. 8. § 25.

2*do*, Even though ordinary manſion-houſes ſhould fall to the eldeſt as a *praecipuum*, the eſtate ought to be ſuch as to intitle it to a capital meſ-

ſuage,

ſuage, and able to afford the expence of keeping it in repair; otherwiſe, what was intended as a mark of honour, will be a mark of diſhonour to the family, which, it is highly probable, would be the caſe in the preſent inſtance, where the eſtate is ſo very ſmall, that the ſhare of the eldeſt ſiſter is at preſent ſet for L. 28 Scots *per annum.*

And, 3*tio*, The houſe ought to be actually ſubſiſting, and not bare walls without a roof, as in the preſent caſe.

To the 1*ſt*, it was *anſwered*: That the diſtinction here between houſes built in the form of towers and fortalices, and ſuch as are not built in that form, is not ſupported by any of the authorities quoted, except M'Kenzie, who, from a miſapprehenſion of Lord Stair, confines the right of the eldeſt ſiſter to houſes built in that form; whereas, it is evident, that Lord Stair, under the *et caetera* at the place referred to, comprehends all houſes, in whatever form they are built; as do the other writers on our law. See Skene, de verb. ſignif. *voce Eneya*; Craig, l. ii. dieg. 12. § 7.; Balf. Practicks, p. 223.; Lord Bankton, l. iii. tit. 5 § 85.; and Erſkine, l. iii. tit. 8. § 5.

To the *ſecond*: None of our law-books or deciſions make any diſtinction, whether the eſtate be large or ſmall; it is ſufficient if it has been the inheritance of the family; and, in the caſe of Cowies, in 1707, the court found the eldeſt heir-portioner intitled to the principal meſſuage as a *praecipuum*, though the eſtate was even ſmaller than here.

And, to the *third*: The ruinous condition of the houſe ought to be no reaſon for making it an exception from the general rule, as the decay is in a great meaſure owing to the antiquity of it, and as it was the ordinary reſidence of the family, while they lived on the eſtate.

Pleaded for the younger ſiſters, on the *ſecond* point, If a recompenſe is due? A perfect equality, the moſt rational and equitable rule of ſucceſſion, was formerly followed in this, as in moſt other countries, till, by the feudal cuſtoms, it was altered in the *male* ſucceſſion, and the eldeſt ſon preferred to the younger: But, though this change took place as to *males*, yet the old rule of ſucceſſion remained among *females*, who are all equally called to the ſucceſſion, without any preference to the elder ſiſter over the younger, except in ſuch rights as do not admit of a diviſion, or ſuch as are by law conſidered as indiviſible; thoſe the law gives to the eldeſt heir-portioner, without any recompenſe; for theſe ſhe pays a recompenſe: Thus, titles of honour and dignity fall to the eldeſt ſiſter without any recompenſe; becauſe, *ſua natura*, they do not admit of a diviſion or of a valuation; a ſingle right of ſuperiority falls alſo to the eldeſt ſiſter, as being indiviſible, *ex lege*; but, if it yields a yearly profit as a feu-duty, ſhe muſt pay a recompenſe for it to the younger ſiſters; but there is no neceſſity for the manſion-houſe and gardens falling to the eldeſt ſiſter without a recompenſe. They are neither *ſua natura*, nor *ex lege*, indiviſible, and may eaſily be valued; and, therefore, they ought to be divided among the heirs-portioners; or, if they ſhall be conſidered as falling to the eldeſt ſiſter, there is ſurely no reaſon why ſhe ſhould not pay a recompenſe for them to the other heirs-portioners, in order to preſerve that equality among them which is the principle by which the female ſucceſſion is regulated. See Reg. Maj.

Maj. l. ii. c. 27. § 3. and 4. c. 28. § 1, 2. 3. and 4.; Balfour's Pract. p. 223.; Skene, *voce*, *Eneya*; Craig, l. ii. dieg. 8. § 7.; and the case Carrober *contra* Sibbald, 2d December 1669, observed by Gosford; and Hathorn *contra* Gordon, 12th December 1696, observed by Fountainhall.

Answered: The mansion-house may, with great propriety, be reckoned among the subjects that do not admit of a division, as it would be impossible to divide a small house among a number of heirs-portioners; neither does it properly admit of a valuation, as it would be next to impossible to get any two valuators to agree in a value to be put upon houses; and, therefore, the law has justly considered the principal messuage as a subject indivisible, and incapable of being valued, and which therefore falls to the eldest sister. And, though some of our oldest writers, and more ancient decisions, lay it down that a recompense is due, yet our later writers are of a contrary opinion, supported by an uniform train of decisions from the beginning of this century, where, as often as the case occurred, the court found the eldest heir-female intitled to the principal messuage, without any recompense. See Stair, lib. iii. t. 5. § 11.; Erskine, lib. iii. t. 8. § 5.; and June 10. 1707, Cowies; 1730, Carnock; 1742, Peadies; and 1750, Gadgirth.

'The Lords found the eldest sister intitled to the principal messuage 'as a *praecipuum*, without any recompense.'

C. B.

Act. *Lockhart.* Alt. *Henry Dundas.*

No. XVIII. *November* 14. 1765.

EARL of MARCH;

Against

LEISHMANS.

TACK.

Tacit Relocation of Teinds.

THE proprietors of Pewlands had right to a sub-tack of the teinds of those lands, for payment of L. 80 Scots.

The minister of Newlands got an additional stipend by a decree of augmentation, and there was localled, on the lands of Pewlands, 19 s. 11 d. of money, and 4 bolls of victual more than the teind-duty payable by the sub-tack, whereof the patron was ordained to relieve the heritor yearly, during the course of the tack, after which the heritor was appointed to pay the stipend conform to the locality.

 The

The tack expired in 1743; but the Earl of March, the patron, continued to pay the ſurplus ſtipend till 1757, when he brought an action, concluding, 1*ſt*, for payment of the free teind in time coming; 2*do*, for repetition of the ſurplus ſtipend.

Pleaded for the defenders: They poſſeſſed by tacit relocation, and can only be liable for the tack-duty.

Anſwered: The purſuer inſiſts for the free teind, only from the date of the citation, which is equivalent to an inhibition. Tacit relocation is founded on the preſumed conſent of the titular, and that is neceſſarily excluded by a proceſs for the full teind.

In lands, warning was introduced for the protection of tenants, that they might not be thrown deſtitute by being removed on the term day without notice; but no ſuch inconvenience can take place in tacks of teinds. Again, the value of teinds is fixed by law at a tenth of the produce: In lands, there is no *legal* value for which a tenant can be made liable; and yet, even in the caſe of lands, an action for a greater duty, in time coming, has been found to interrupt tacit relocation, without warning; P. Falc. 6th March 1683, M'Brair *contra* Romes.

In ſeveral caſes, citation in a proceſs has been found to interrupt tacit relocation of teinds, as 19th January 1669, Earl of Athole *contra* Robertſon; and 28th November 1676, Shiel *contra* pariſhioners of Preſtonhall. Forbes *on tithes*, holds citation to be equivalent to inhibition, p. 320. 355.

2*do*, The ſurplus ſtipend, paid by the patron, ſince the expiry of the tack, muſt be reſtored as *indebite ſolutum*, in conſequence of the decerniture of the decree of locality.

Replied, on the 1*ſt* point: All our lawyers have agreed that inhibition is the proper method of interrupting tacit relocation of teinds; Stair, II. 8. 23. and IV. 24. 2.; Mackenzie, II. 10. 19.; Bankton, II. 8. 179.; Erſkine, II. 10. 21.

Whether an action, concluding that the heritors ſhould be ordained to ſurrender the poſſeſſion, would be competent, it is unneceſſary to inquire. But an action for payment of a higher duty cannot deprive him of the poſſeſſion; on the contrary, it clearly ſuppoſes that the heritor is to continue to poſſeſs; and, ſo long as his poſſeſſion continues, he can be liable in no higher rent than what he agreed to pay; nothing but a joint agreement can ſubject him to an additional rent. Suppoſe a tenant, after the expiry of a leaſe of lands, ſhould notify to the heritor, that he is to pay a lower rent in time coming, ſtill he would be liable for his original rent, unleſs he gave up the poſſeſſion; and a like notification by the proprietor, would be equally ineffectual to increaſe the rent above what had been formerly paid.

Indeed, the preſent queſtion was expreſsly determined between the Earl of Selkirk and Macmorran of Gleſpine, in 1764, where citation was found not to be equivalent to inhibition, and the heritor was ſubjected to the full teind only from the date of the interlocutor.

In the caſe of the Earl of Athole againſt Robertſon, uſe of payment to the miniſter of the whole teind, was found ſufficient to defend the heritor from ſecond payment to the titular, till inhibition or citation; but

there

there the heritor did not pretend any right from the titular; and *citation* was deemed a ſufficient intimation of the titular's right.

The deciſion between Mr George Shiell and his pariſhioners, was in the caſe of *vicarage* teinds, which do not require inhibition, as is laid down by Lord Stair, IV. 24. 11.

Replied, on the 2*d* point: A perſon poſſeſſing by tacit relocation, poſſeſſes on the ſame conditions as if the tack had been expreſsly renewed. If, in this caſe, the patron had granted a new tack in terms of the former, he muſt have relieved the heritor of the ſurplus teind, which he is equally bound to do, by having allowed him to poſſeſs by tacit relocation.

The Lords 'found, that the citation does not interrupt the tacit relo-'cation; but found the defenders liable for the full teind from the 'date of the interlocutor; and found the Earl intitled to repetition 'of the ſurplus ſtipend from the ſame period.

G. F.

Act. *Ilay Campbell.* Alt. *Macqueen.* Reporter, *Strichen.*

No. XIX. *November* 14. 1765.

JAMES HILL of Inchmichael;

Againſt

JAMES HUNTER and JOHN HILL, Tutors to AGNES HILL, and MARGARET HUNTER, Widow of CHARLES HILL.

Whether Perſons, at whoſe Inſtance it is provided by a Marriage-Contract that Execution ſhall paſs, have a Title to inſiſt in an Action, after the Death of the Husband, for having the Proviſions of the Marriage-Contract implemented.

IN 1757, a contract of marriage was entered into between Charles Hill and his father John Hill, tenant in Balrudrie, on the one part, and Margaret Hunter and her father James Hunter, on the other part.

By this contract, James Hunter became bound to pay Charles Hill, his heirs, executors, or aſſignees, the ſum of L. 1000 Scots as Margaret Hunter's tocher. 'For the which cauſes, Charles Hill binds and obliges 'him, his heirs, executors, and intromitters with his goods and gear 'whatſomever, to ware and employ the ſum of 3000 merks Scots, upon 'good and ſufficient ſecurity for annualrent, to be provided to himſelf 'and the ſaid Margaret Hunter, and longeſt liver of them two, in 'conjunct

'conjunct fee and liferent, for the ſaid Margaret Hunter her liferent-
'uſe allenarly, and to the child or children to be procreated of this mar-
'riage in fee; whom failing, to the ſaid Charles Hill, his own neareſt
'heirs, or aſſignees whatſoever in fee, and to take the writs and ſecuri-
'ties of the ſaid 3000 merks, conceived in the terms foreſaid.'

There are other proviſions made in favours of the bride, in the event of her ſurviving her intended huſband; and it is declared, that the foreſaid proviſions ſhall be in full ſatisfaction to Margaret Hunter of her tierce, and third of moveables; and to the children of the marriage, of their legitim, and bairns part of gear.

John Hill, the bridegroom's father, in contemplation of this marriage, aſſigned his farm of Balrudrie and ſtocking, in favours of Charles Hill, his heirs, executors, or aſſignees, in conſideration of which, Charles diſcharged his father of every claim, either legal or conventional; and the contract concludes with the following clauſe: 'And, laſtly, it is a-
'greed, of conſent of parties, that all execution neceſſary ſhall paſs up-
'on this preſent contract, at the inſtance of the ſaid James Hunter and
'Charles Hunter his ſon, and James Hill of Inchmichael, or any of
'them; and failing of them, at the inſtance of their heirs, or the heirs
'of any one of them, for ſeeing the proviſions made in favour of the
'ſaid Margaret Hunter, and the children of the marriage, implemented,
'after the form and tenor of this contract in all points.'

The marriage was ſolemnized, and of it there was one child, Agnes.

Charles Hill increaſed his original ſtock, but did not lend out the 3000 merks in terms of the marriage-contract; and, in 1760, he executed a deed, whereby he diſponed to Margaret Hunter his wife, and Agnes Hill his only child, equally betwixt them; and, failing Agnes Hill before majority or marriage, without heirs of her body, to Margaret Hunter, her heirs, executors, or aſſignees, his whole means and effects, with the burden of his debts, and a ſmall annuity to his father and mother, and then follows this clauſe: 'And further, providing and de-
'claring hereby, that, in caſe of the death of my ſaid daughter before
'majority or marriage, without heirs of her body as ſaid is, and that
'the whole of my means and effects ſhall, in that event, fall and accreſce
'to my ſaid ſpouſe, then, and in that caſe, I hereby burden and oblige
'her and her foreſaids to content and pay to my neareſt in kin, at leaſt
'to ſuch of them as my ſaid ſpouſe ſhall think proper, L. 1000 Scots,
'at the firſt term after the deceaſe of Agnes Hill, with intereſt from the
'term of payment.'

By the ſame deed, Margaret Hunter, the wife, is burdened with the aliment and education of her daughter, until ſhe attain the age of 18; but, in conſideration thereof, ſhe is appointed to uplift the annualrent of her daughter's ſhare of the effects, until ſhe attained the foreſaid age of 18; and, by an after-clauſe in the deed, Charles Hill nominated as tutors and curators to his daughter, Margaret Hunter his wife, James Hunter his father-in-law, John Hill younger, and James Hill, both in Inchmichael, his brothers, Alexander Miller, and Robert Hunter, the huſbands of his two ſiſters; and declared the major part of them accepting to be a quorum.

Charles

Charles Hill died in two days after executing this deed; the ſubjects belonging to him at the time of his death were, his pleniſhing, his leaſe, and ſtocking of his farm, of which James Hunter the grandfather of Agnes Hill, and John Hill her father's brother, two of the tutors nominated, after applying to the other tutors named, but who declined to act, took up inventories, and intruſted Margaret Hunter the widow with the management of the farm, and ſhe having afterwards married another huſband, the tutors diſpoſed of the farm, and rouped the ſtocking, and made a diviſion of the proceeds between the widow and daughter, in terms of Charles Hill's ſettlement 1760; and afterwards tutorial inventories were made up.

James Hill, the immediate elder brother of Charles, and his heir both of line and conqueſt, failing the daughter Agnes, took no management as tutor in his niece's affairs, but in character of one of the perſons, at whoſe inſtance it was provided execution ſhould paſs upon the marriage-contract, after the widow's marriage, brought an action againſt her, libelling upon the marriage-contract, particularly, the clauſe for employing the 3000 merks on ſecurity, for behoof of the widow in liferent, and children in fee, whom failing, to Charles Hill, his neareſt heirs or aſſignees; and concluding, that Margaret Hunter ſhould be decerned as intromitter with Charles Hill's effects, 'To provide and employ the ſaid 'ſum of 3000 merks to herſelf in liferent, and to the ſaid Agnes Hill, 'the only child of the marriage, in fee; whom failing, to the neareſt 'heirs whatſomever of the ſaid Charles Hill in fee.'

This action was brought before the ſheriff of Perth-ſhire; but, after ſome proceedings, was removed into this court by advocation. Margaret Hunter appeared as a defender. James Hunter and John Hill, the two accepting tutors, alſo appeared for their pupil Agnes Hill, and diſclaimed the purſuer's proceſs, and concurred with Margaret Hunter in her defences, and objected to the title of the purſuer to inſiſt in ſuch an action. The cauſe came before Lord Barjarg as Ordinary, who, at firſt, ſuſtained the purſuer's title; but afterwards made aviſandum to the court, and ordered informations.

Pleaded for the defenders: The purſuer has no title to inſiſt in this action. The intention of providing by a marriage-contract that execution ſhall paſs at the inſtance of certain perſons, is, that a huſband may be compelled to fulfil his obligations to his wife, while under coverture, and a father to his children, while the *patria poteſtas* ſubſiſts. Were it not for this clauſe of execution, a man might neglect to infeft his wife in her jointure, and thereby ſuffer his other creditors, though poſterior, to obtain a preference over his eſtate, or he might ſquander his ſubſtance and leave his children deſtitute, although, by his marriage-contract, he was bound to infeft his wife in a jointure, and grant proviſions to his children. An obligation to grant infeftment or proviſions, points out a legal remedy, an action of implement; but this is a remedy a wife cannot properly uſe againſt her huſband, nor children againſt their father. The clauſe of execution points out the proper perſons by whom this legal remedy may be made effectual. Perſons, who are the friends of both parties, and will not, without neceſſity, inſiſt for explicit implement to the prejudice of the huſband, nor permit the obligation to re-

main unperformed, to the prejudice of the wife and children; but, on the huſband's death, the cauſe ceaſes which rendered ſuch interpoſition neceſſary; the obligation, if not performed by the huſband, remains as a debt upon his repreſentatives; his wife, and his children, have *perſonam ſtandi*. The wife always, the children when of age, may ſue for implement in their own name; and, if the children are under age, the tutors, curators, or adminiſtrators in law, may ſue in their name.

By the deed 1760, the purſuer was nominated, with others, as tutor to the only child of the marriage; he neglects the office of tutor, and, in character of one of the truſtees by that marriage-contract, appears not only in oppoſition to Margaret Hunter, the widow of his brother, but alſo in oppoſition to John Hill, one of the accepting tutors, and to James Hunter, the father of Margaret, and grandfather to the child, the other accepting tutor, and alſo a truſtee for the execution of the marriage-contract; and inſiſts to have that money laid out for the pupil, which is already in the hands of the pupil's tutors, legally inveſted in that office, which the purſuer might have ſhared with them, had he inclined. He pretends to act for the infant; but they are the perſons whom the father of the infant, and the law, intruſted with that office: If they fail in their duty, they may be removed as ſuſpect; but, while their office ſubſiſts, no one has a right to act for their pupil independent of them.

When a huſband and father, who is bound to lend out money, in his marriage-contract, for behoof of his wife and children, dies prior to his ſo lending it out, the obligation to provide does in effect fly off, or, more properly, is converted into an obligation of debt, capable of an immediate action for payment and ſatisfaction, without the intervention of any perſon named in the contract to ſue for execution. If the money, in this caſe, had been lent out in terms of the contract, the wife would have had immediate acceſs to the annualrents, but the children could have no right to the fee, until ſerved heirs of proviſion; but, when the money is not lent out, the *jus crediti*, and right of action againſt the father's repreſentatives, veſts in the children, and tranſmits to their ſucceſſors, without the neceſſity of their being ſerved heirs on the marriage-contract, as has been determined in many caſes; *Dictionary*, vol. 2. p. 279.; Mrs Porterfield *contra* John Gray, 9th December 1760; therefore, if any action was competent to this purſuer, it muſt be an action to force payment to the pupil, and not an action to force implement of the marriage-contract, by lending out the money, which is inept, and tends directly to diveſt the pupil of a right already veſted in her; for, if the money is lent out, in terms of the contract, a ſervice would be neceſſary to veſt the right in Agnes Hill. The nomination of perſons in a marriage-contract, at whoſe inſtance execution may paſs, is determined by the death of the huſband and father, and ſuch has been the univerſal underſtanding of the nation; for no inſtance will be found of any action carried on by a perſon, named in a marriage-contract, ſueing for implement againſt the repreſentatives of the huſband, after his deceaſe.

Anſwered for the purſuer: The defenders have affected to conſider the nomination of perſons in a marriage-contract, at whoſe inſtance execution is to paſs, as a device calculated for obtaining juſtice to wives, while under coverture, and children *ſub patria poteſtate*: But ſuch nominations

minations ought not to be viewed in ſo limited a light. Children *ſub patria poteſtate*, and wives under coverture, may compell execution of the obligations due to them from their parents and huſbands. Curators *ad lites* will be named by the court, who may as effectually procure juſtice, as a perſon authoriſed by a contract to ſue for execution; and many inſtances have occurred of ſuch actions; it is not, therefore, neceſſary for obtaining juſtice to wives under coverture, or children *ſub poteſtate*, that ſuch nominations in marriage-contracts ſhould be made. Such nomination may be expedient for them, but is not neceſſary; and it may be equally expedient for them in other ſituations. An infant, after the death of its father, is in as helpleſs a ſituation as during his life. It is not *ſub patria poteſtate*, but is as unable to procure juſtice as if it was. If it has no tutors, nothing can be done for it. If it has, in all probability, the tutors are of the choice and nomination of the father; and, therefore, if the father was diſpoſed to fruſtrate the proviſions of the marriage-contract in favours of his children, no reliance can be had on tutors named by him. And no good reaſon can be aſſigned why the ſame remedy that had been provided againſt the father, ſhould not be effectual againſt the tutors named by him, if they ſhould act in ſuch a manner as to make it proper to make uſe of that remedy. There is nothing in the words of the marriage-contract to limit the powers of thoſe authoriſed to ſue for execution to the lifetime of the father only; neither do any principles of law require ſuch limitation; on the contrary, agreeable to the general rules of law, the powers to put a deed in execution, muſt extend to every caſe where execution is competent. The obligation, in the contract of marriage, is not perſonal to Charles Hill the huſband, but tranſmits againſt his heirs, executors, and intromitters with his effects; therefore, the heirs and ſucceſſors of Charles Hill were as much bound by the contract as himſelf, and the obligation as valid againſt them after his death, as it was againſt him while alive; and that being the caſe, an action for execution muſt be competent after his death, as it would be abſurd that the obligation ſhould ſubſiſt without its being practicable to force execution of it againſt the heirs, &c. in the ſame manner as could have been done againſt Charles Hill himſelf while alive.

The defenders have argued, that, if ſuch action is competent, it can only proceed at the inſtance of the tutors, who are by law inveſted with the excluſive right of carrying on actions for behoof of their pupil; but ſuch argument would reſolve into this: That at no time was an action, ſuch as the preſent, competent. A father is as much intitled to the adminiſtration of the affairs of his child while under age, as a tutor is after his death; he, therefore, is intitled to ſue all actions in the name of his children, and has as good a claim to an excluſive title, in this reſpect, as a tutor. Hence, with equal propriety, it might be argued, that, during his lifetime, the purſuer could not have inſiſted in ſuch action as the preſent; yet no attention could have been paid to ſuch a plea in the lifetime of the father, being directly in oppoſition to the terms of the contract; and, as ſuch action muſt have been competent, during the father's life, it muſt now be ſo againſt the intromitters with his effects, againſt whom the obligation in the contract muſt be effectual.

It

It has been ſaid, that, if any action was competent at the purſuer's inſtance, after the death of Charles Hill, it was an action for payment; but the terms of the obligation, in the contract of marriage, ſtand in direct oppoſition to ſuch an argument. By the contract, Charles Hill binds himſelf, his heirs, &c. not to pay a ſum, but *ad factum praeſtandum*, to ſecure a certain ſum of money in a particular manner. It is admitted, that, during Charles Hill's lifetime, he could have been compelled to employ that ſum, in terms of the contract; and, as the obligation in the contract muſt be effectual againſt his heirs, executors, and intromitters with his effects, agreeable to the expreſs words of the contract; of conſequence, the preſent action muſt be as competent againſt them, as it would have been againſt Charles Hill himſelf, had he been now alive; and, it is clearly for the intereſt of Agnes Hill the pupil, that the money ſhould be ſecured in terms of the contract, which will prevent its being dilapidated or waſted by miſmanagement.

'The Lords ſuſtained the purſuer's title, and found, that the defen-
'ders were bound to lay out the 3000 merks, in terms of the con-
'tract of marriage.'

And adhered on adviſing a reclaiming petition, with anſwers.

A. E.

For the purſuer, *Andrew Crosbie*, and *William M'Kenzie*.
For the defenders, *James Montgomery*, and *David Dalrymple*, jun.

No. XX. *November* 20. 1765.

SYMON;

Againſt

MACDONALD.

PRESUMPTION.

Rights taken in Name of Children.

JAMES MACDONALD of Kineton, granted an obligation to John Symon, in theſe words: 'I hereby oblige myſelf to diſpone two
'ox-gates of the weſt ſide of Micraſs to your ſon, when you ſhall think
'fit, or to pay him 1800 merks, as to me ſhall ſeem proper.'

The ſon was minor at the time; and, before his majority, the father gave a diſcharge of the obligation, bearing that the 1800 merks had been paid to himſelf and his creditors.

In

In an action brought by the ſon, ' The Lords found, that the father's ' diſcharge, bearing payment of the ſaid price to himſelf, and his law-' ful creditors, is a ſufficient document of payment.'

G. F.

Act. *Crosbie.* Alt. *Ilay Campbell.*

No. XXI. *December* 5. 1765.

HENDERSON;

Againſt

MURRAY.

WRIT.

Miſſive Letters not holograph, and wanting Witneſſes.

JOHN HENDERSON and Robert Cowan interpoſed their credit for Samuel Cowan by accepting bills, for an arrear of rent which he owed, in conſequence of a miſſive letter from Adam Murray, whereby he became bound to join with them conjunctly in granting bills, or paying the money.

Murray acknowledged his ſubſcription; but pleaded that the miſſive was not obligatory, as not *in re mercatoria*; and neither holograph, nor ſigned before witneſſes.

' The Lords repelled the defence.'

G. F.

Act. *Armſtrong.* Alt. *Croſbie.*

No. XXII. *December* 7. 1765.

BRITISH LINEN Co;

Againſt

CLERKSON.

CAUTIO JUDICIO SISTI ET JUDICATUM SOLVI.

UPON an oath *de meditatione fugae*, the admiral granted warrant for incarcerating a perſon ſaid to be debtor in a debt merely mercantile, till he ſhould find caution *judicio ſiſti et judicatum ſolvi.*

A ſuſpenſion having been offered, the Lords paſſed the bill as to the caution *judicatum ſolvi*; but refuſed it as to the caution *judicio ſiſti.*

G. F.

For the Chargers, *Lockhart.* Alt. Reporter, *Elliock.*

No. XXIII. *December* 10. 1765.

JOHN BRUCE and Co;

Againſt

DAVID BEAT.

INSTITOR.—PRESCRIPTION.

Conſtituent liable for the Debts of the Inſtitor.—Preſcription of Accounts.

JOHN LEE was proprietor of the leaſe of the unlicenſed theatre in Edinburgh, called the Concert-hall, and of the wardrobe and machinery belonging to it.

In 1754, being diſtreſſed by his creditors, he aſſigned his right to Lord Elibank, and others, who granted to him 'full power and commiſ-
'ſion to vary the ſaid houſe, cloaths, and ſcenes at pleaſure; declaring us
'and the premiſes nowiſe liable for any debts the ſaid John Lee may
'contract in carrying on the entertainments of the ſaid houſe.' There

was

was alſo a clauſe declaring the commiſſion to be during pleaſure, and obliging Mr Lee to make the ſcenes, cloaths, &c. forthcoming.

Mr Lee continued to act as manager till 1756, when he was diſmiſſed.

In 1758, the gentlemen transferred the leaſe of the concert-hall, with its pertinents, to James Callendar and David Beat, under an obligation to relieve them of all claims againſt the concert-hall, 'on account of a-'ny thing done or contracted by John Lee as their manager, from the 'time of his aſſignation to them, till he was turned out of the ma-'nagement.'

John Bruce was creditor in three accounts of printing for the concert-hall, in 1755 and 1756. For the firſt of theſe accounts, Mr Lee granted his bill in 1755, and atteſted it as juſt, after the lapſe of the triennial preſcription. The other accounts bore atteſtations without date; and decree was recovered againſt Lee for the whole in 1758.

An action was brought for payment of thoſe accounts againſt David Beat, as coming in place of the gentlemen proprietors of the leaſe, in conſequence of the above obligation; and the debate reſolved into two points: 1*mo*, Whether thoſe gentlemen were liable for the debts contracted by Lee? 2*do*, Whether or not the accounts were preſcribed?

Pleaded for the defender, on the 1*ſt* point: The gentlemen interpoſed from motives of public ſpirit; and, without any view of gain, they gave the full uſe of the houſe, and of the profits thereof, to Mr Lee, burdened only with the price which they had paid, and certain annuities to which it was ſubject before their purchaſe.

In theſe circumſtances, the clauſe declaring that they ſhould not be liable for Lee's debts, was ſuperfluous; there were no *termini habiles* for ſubjecting them: But, though Lee ſhould be conſidered as an *inſtitor*, the rule of law is, *conditio præpoſitionis ſervanda eſt*, l. 11. § 5. *D. de Inſtit. act.*

Anſwered for the purſuer: It is clear, from the commiſſion granted to Lee, and was univerſally underſtood at the time, that the gentlemen had become purchaſers of the concert-hall, and its pertinents. It likewiſe appears from the commiſſion, that Lee was an inſtitor or manager employed by them; and they are liable for his debts, even upon the ſuppoſition that the purſuer had conſidered him in a different light, and looked upon him as their leſſee.

In that view of the caſe, the purſuer contracted in the faith that he was proprietor of the leaſe, ſcenes, decorations, and other moveables, of which he ſaw him in poſſeſſion. Suppoſe the purſuer had poinded thoſe moveables, that the gentlemen had claimed them as their property; they might indeed have reclaimed the goods, but it could only have been by acknowledging that Lee was their inſtitor; and that acknowledgement muſt have ſubjected them to the debts contracted in the courſe of the employment.

And the caſe is equally clear upon the ſuppoſition, that the purſuer knew that Lee acted as manager for the proprietors, it being an eſtabliſhed point in law, that the conſtituent is liable for the deeds of the inſtitor; l. 3. 4. l. 5. pr. § 1. *D. de Inſtit. Act.*

Nor can the defender avail himſelf of the clauſe in the commiſſion, as ſecuring the proprietors againſt Lee's debts. Had Lee ſold the furniture of the concert-hall, ſet up merchant, and broke, the gentlemen would

not

not have been liable for ſuch debts as he might have contracted in a buſineſs foreign to the *conditio praepoſitionis*. This is all that is meant by the text referred to, not that parties can be affected by private clauſes in a deed which they had no acceſs to know. On the contrary, if the employer intended that his inſtitor ſhould act, not on the general principles of law, but on any peculiar footing, it was neceſſary *proſcribere palam*, to publiſh thoſe conditions, in order to put parties on their guard; and ſo the law is laid down, l. 11. § 2. 3. 4. *D. de Inſtit. Act.*

This is perfectly analogous to our law; a wife is held to be *praepoſita negotiis domeſticis*, and, whatever private agreement may have taken place to the contrary, the huſband will be liable for her deeds, unleſs he has uſed an inhibition; a ſpecies of the *proſcriptio palam*.

Pleaded for the purſuer, on the 2*d* point: The triennial preſcription is, properly ſpeaking, no more than a *praeſumptio juris* of payment, which may be taken off by the oath or writing of the party: As the oath would be probative at whatever time it was emitted, there is no reaſon why the mean of proof by writing ſhould be reſtricted to the three years; and there is no foundation in the act of parliament for reſtricting it.

Though, therefore, the atteſtations ſhould be ſuppoſed to have been granted after the three years, the debt will be ſaved from preſcription. But, independent of them, the decree 1758 muſt be ſufficient, being a document taken againſt the inſtitor upon his being removed from the management, which will be effectual againſt his conſtituents.

Anſwered for the defender, on the 2*d* point: It is immaterial, whether the atteſtations were granted within the three years or afterwards. The act of parliament 1679, c. 85. declares, that, after the three years, 'the creditour ſall have na action, except he outher prieſe be writ, or be 'aith of his partie.' But, in this caſe, there is no ſuch proof. The *party* is he for whoſe behoof the furniſhing was made, or he who is purſued for it. And, though an inſtitor or ſervant might be a good *witneſs* againſt his employer, he cannot ſubject him by an oath upon reference, or an atteſtation in writing, (Edg. 11th Feb. 1724, Guthrie *contra* Marquis of Annandale); eſpecially, if, as in this caſe, it be given after he is diſmiſſed from the ſervice.

Upon the ſame principles, a decree againſt the inſtitor cannot interrupt the preſcription in favour of the maſter. Indeed, here, the decree was taken againſt Lee himſelf as the proper debtor, and not as having contracted as manager for others.

'The Lords repelled the defence, that the defender is not liable for 'the accompts purſued for; but ſuſtained the defence of the trien- 'nial preſcription.'

G. F.

Act. Lockhart, Crosbie. *Alt. Rae.*

No. XXIV.

No. XXIV. *December* 11. 1765.

ROBERT GRAY;

Againſt

WILLIAM EARL of SUTHERLAND.

ALTERNATIVE,

Where no time is ſpecified.

IN 1749, William then Earl of Sutherland granted a tack to Alexander Gray of the lands of Milnclaran ‘ for 19 years, *or* the lifetime of ‘ the ſaid Alexander Gray, and of Robert Gray his brother, optional to ‘ the ſaid Alexander Gray, after the term of Whitſunday next, or the ‘ firſt term of Whitſunday thereafter.’

Alexander Gray poſſeſſed the lands, without making his option, for 14 years, when he ſignified his deſire of having the tack granted for the two lives.

Robert Gray, having adjudged his brother's intereſt, brought an action for obtaining a tack in theſe terms.

Pleaded for the defender: It could never be the intention of the granter of the tack, to give 19 years firſt, and two lives thereafter. The obligation was alternative, and by poſſeſſing for three fourths of the ſpace, the tenant muſt be held to have made his option of the 19 years certain.

Anſwered: No time was limited for making the option, and it was incumbent on the proprietor to inſiſt to have the option declared.

‘ The Lords found, that the purſuer is intitled to the benefit of the op-
‘ tion.’

G. F.

Act. *Burnet.* Alt. *Wm. M'Kenzie.*

No. XXV. *December* 11. 1765.

ELIZABETH GILMOUR, Relict of the Deceaſed Mr JAMES JUSTICE of Juſtice-hall;

Againſt

The Honourable JOHN ARBUTHNOTE.

Truſt.

MR James Juſtice, in 1747, granted a bond to Mr James Arbuthnote merchant in Edinburgh for L. 100 Sterling; and, as a farther or collateral ſecurity for the ſum in the bond, Mr Juſtice conveyed to Mr Arbuthnote an adjudication againſt the eſtate of Stanhope for L. 1000 Scots principal, and conſiderable bygone annualrents.

Some time after this tranſaction, Mr Juſtice's affairs being in diſorder, he named certain truſtees, who took the management of his ſubjects; and, from theſe truſtees, Mr Arbuthnote received payment of his debt of L. 100, contained in Mr Juſtice's bond.

Mr James Arbuthnote having died without reconveying the adjudication on the eſtate of Stanhope to Mr Juſtice, an action was raiſed by Mr Juſtice againſt Robert Arbuthnote, the heir of James, concluding that the right which ſtood in Mr Arbuthnote's perſon to that debt ſhould be reduced; and that Robert, as heir to James, ſhould be obliged to denude thereof in favours of Mr Juſtice, the debt, for ſecurity of which it was conveyed, being *aliunde* ſatisfied and paid.

Before any judgment was given in this action, both Mr Juſtice and Mr Robert Arbuthnote died. But Elizabeth Gilmour the widow and executrix of Mr Juſtice, having wakened the proceſs, and transferred the ſame againſt the Honourable John Arbuthnote, the heir of Robert and James Arbuthnotes, the Lord Ordinary, before whom the action came, allowed a proof, before anſwer, of all facts and circumſtances for ſupporting the libel, and afterwards pronounced this interlocutor: 'The Lord Ordinary, having adviſed this proceſs, proof adduced by the purſuer, and writs produced, finds it proven, that the conveyance of the debt in queſtion, and diligence thereon, againſt the eſtate of Stanhope, was only granted as an additional or collateral ſecurity for payment of the ſum of L. 100 Sterling, and annualrents thereof, due by the bond libelled on, granted by the deceaſed Mr James Juſtice: Finds it likewiſe proven, that the ſaid James Arbuthnote was thereafter aſſumed into the benefit of the truſt-right, executed by the ſaid Mr James Juſtice for behoof of his creditors, in conſequence of which, he and his repreſentatives received payment of the debt contained in the ſaid bond; and, therefore, finds the repreſentatives of the ſaid Mr James Juſtice

'have

' have the only good and undoubted right to the decreet of adjudication, ' deduced for the foreſaid debt upon the eſtate of Stanhope, and lands, ' and ſums of money therein contained: Ordains the defender, Mr ' John Arbuthnote, and his father for his intereſt, to make up and e- ' ſtabliſh a proper right thereto, in his perſon, as repreſenting the de- ' ceaſed Robert and James Arbuthnotes, and habily to convey and make ' over the ſame to the ſaid Mr James Juſtice's repreſentatives, they always ' compleating their titles to the ſaid debt and diligence before extracting; ' and reduces, decerns, and declares accordingly.' And, to this interlocutor, the Lord Ordinary adhered, with the variation of finding, that the purſuer muſt be at the expence of making up titles, in the defender's perſon, to the debt in queſtion.

Mr Arbuthnote reclaimed to the court, and contended, that, as the proof was allowed by the Lord Ordinary before anſwer, all objections to the competency of a proof by witneſſes, in this caſe, was entire. It was acknowledged that the purſuer had brought pretty ſatisfactory proof that this was a truſt; but it was pleaded, that, in point of law, a truſt could not be proved by parole-evidence, the act of parliament 1696, cap. 25. having altered our former practice as to truſts, as, by that act, it is ſtatute and ordained, ' That no action of declarator of truſt ſhall be ſuſtained as ' to any deed of truſt made for hereafter, except upon a declaration or ' backbond of truſt, lawfully ſubſcribed by the perſon alledged to be the ' truſtee, and againſt whom, or his heirs, or aſſignees, the declarator ' ſhall be intented, or unleſs the ſame be referred to the oath of party *ſimpliciter*.' And, as there was here no backbond, or declaration of truſt ſubſcribed by James Arbuthnote, and as Mr Arbuthnote was now dead, ſo that a proof, by his oath, could not be had; therefore, the action muſt fall; and, in ſupport of this plea, the purſuer referred to the deciſion in the caſe of Watſon *contra* Forreſter, 9th December 1707, collected by Lord Fountainhall.

Anſwered for Mr Juſtice: There is, in this caſe, ſufficient evidence to ſhow that the debt of L. 100, contracted by Mr Juſtice to James Arbuthnote, by his bond in 1747, was wholly paid up; and likewiſe, that the aſſignation to the debt on the eſtate of Stanhope, in favour of James Arbuthnote, was granted only as a collateral ſecurity for payment of ſaid debt of L. 100, contained in Mr Juſtice's bond. And, as theſe facts are inſtructed, it would be contrary to material juſtice to deprive Mr Juſtice's repreſentatives of this debt upon any nicety or peculiarity of the law. The act of parliament 1696 does not apply, as the preſent action ought not to be conſidered as a declarator of truſt, but as a declarator of extinction of the debt due by Mr Juſtice, and a reduction of the conveyance to Mr Arbuthnote, on account that the purpoſe for which it was granted did not now exiſt.

' The Lords adhered.'

A. E.

For Elizabeth Gilmour, *Alexander Wight.* For John Arbuthnote, *Jo. Douglas.*

No. XXVI.

No. XXVI. *December* 12. 1765.

WATSONS;

Againſt

WATSONS.

ANNUAL RENT,

How far due by Executors?

ROBERT WATSON merchant in Edinburgh, having been married three times, made proviſions in favour of the children of the different marriages.

Upon his death, in 1757, Mary Mearns, his third wife, confirmed executor to him; and, an action having been brought by the children of the firſt marriage, for their proviſions, called all parties having intereſt, in a multiple-poinding; and a new multiple-poinding was brought by her daughters, after her death.

The claims of the children of the firſt marriage were ſuſtained, by an interlocutor of 9th Auguſt 1763. After this, a good deal of litigation enſued, as to the queſtion, How far intereſt could be claimed from the executors?

'The Lords found the executors not liable for the intereſt of the ſubject confirmed, in ſo far as that ſubject did not bear intereſt at the time of the teſtator's death; but found them liable for the intereſt of the ſums bearing intereſt from the term after the teſtator's death; and found them liable in the expences of proceſs, from the interlocutor dated 9th Auguſt 1763.'

G. F.

Act. *Patrick Murray.* Alt. *David Graeme.*

No. XXVII. *December* 14. 1765.

WILLIAM BAIRD, Merchant in Glaſgow;

Againſt

JOHN PAGAN and others, Merchants there.

Goods purchaſed for a particular Purpoſe, through latent Inſufficiency, not anſwering the Purpoſe for which they were bought—the Purchaſer relieved from Price.

IN 1762, John Pagan and others, purchaſed from William Baird a large quantity of ſtrong ale, in order to be exported to the Weſt Indies; but the ale not being properly prepared for the heat of that climate, great part of it was ſpoiled and loſt; on which account, Pagan and the other purchaſers refuſed to pay the price. Baird brought an action againſt them for payment; in defence of which, it was

Pleaded for Pagan and the other defenders: That, when ale is to be exported to hot climates, it muſt be prepared with great attention; it muſt be kept a long time in the caſk before it is bottled, in order that the fermentation may be entirely gone; and it muſt be corked with the beſt corks, and properly packed; for all which, the purchaſer muſt rely on the brewer from whom he buys; and, as it is impoſſible for him to know what time the ale has been in caſk before bottling, it is underſtood that the brewer, who ſells ale for exportation, ſhall furniſh it of ſuch quality, and pack it in ſuch a manner, as will ſtand the climate to which it is to be ſent: That, in this purchaſe, the price was conſiderably higher than would have been given for ale for home conſumpt; yet, that furniſhed was not of proper quality for exportation, or properly corked and packed; and, as it was purchaſed on purpoſe to be exported, of conſequence, the ſeller was bound to deliver ale fit for exportation; and not having done ſo, the purchaſer cannot be liable for the price.

Anſwered for Baird: The ale was ſufficient when he ſold it; the uſual care and attention was paid to bottling and packing it: That he undertook no riſque, and could not, therefore, be anſwerable for any accidents that might occur, or inſufficiency that might ariſe from tranſporting the ale to a foreign market: That ale, in the Weſt Indies, ſells for an extravagant price, which ſhows, that exporting it is attended with conſiderable riſque; and, as the purchaſer has the profits, ſo he muſt run the riſque; there is no certain rules fixed for managing ale for exportation; every brewer follows the method he judges beſt.

'The Lords found the purſuer, the ſeller, in reſpect the ale libelled 'was bought for exportation, is obliged to uphold the ſame to 'have been ſufficient and fit to be exported to the markets in A-'merica and the Weſt Indies.'

A reclaiming petition for Baird was refuſed, without anſwers.

A. E.

For Baird, *James Montgomery and Joſeph Williamſon.* For Pagan, *Jo. Dalrymple.*

No. XXVIII. *January* 14. 1766.

CAMPBELL of Ederline;

Againſt

ISABEL MACNEIL.

FIAR.

Lands taken to the Father in Liferent, thereafter to the ſon in Liferent, and his Heirs-male; whom failing, the Father's heirs in fee.

NEIL CAMPBELL of Dunſtaffnage, in the contract of marriage of Angus Campbell, his ſon, became bound 'to provide his lands 'and eſtate of Dunſtaffnage in favour of himſelf in liferent, and, after 'his deceaſe, to and in favour of the ſaid Angus Campbell, his ſon, in 'liferent; and the fee of the ſame, after both their deceaſes, to the 'heirs-male of the ſaid Angus Campbell his body, of that or any ſub-'ſequent marriage; which failing, to the ſaid Neil his heirs-male, ac-'cording to the rules of ſucceſſion, eſtabliſhed by his rights and infeft-'ments thereof.'

In an action for reducing certain proviſions, granted by Neil Campbell, as contrary to the terms of this contract, brought in name of a truſtee for Angus, it was admitted, that, had the eſtate been taken to the father in liferent, and to the ſon in fee, the father muſt have been held to be diveſted of the fee, in terms of the deciſions quoted in the *Dictonary*, *v. Fiar*; but it was contended, that, as only a right of liferent was provided to the ſon, ſo, leſt the fee ſhould be *in pendenti*, it of neceſſity ſubſiſted in the father.

'The Lords found, that the fee was in the father, and, after his death, 'in the ſon.'

G. F.

Act. *Ro. Campbell.* Alt. *Montgomery.* Reporter, *Pitfour.*

No. XXIX.

No. XXIX. *January* 17. 1766.

ALEXANDER MACADAM;

Againſt

ALEXANDER EARL of GALLOWAY.

COMPETENT.

Action of Mails and Duties, if competent to ſet aſide the Right of a Perſon in immemorial Poſſeſſion, and producing a Seiſine?

IN 1678, Alexander, then Earl of Galloway, granted an obligation to Henry Dun, binding himſelf to denude, in his favour, of a piece of land called Belſcroft, upon payment of L. 400 Scots.

In 1763, John Macadam, the great grandſon of Henry Dun, granted bond to Alexander Macadam his ſon, who led an adjudication againſt him, as charged to enter heir in thoſe lands to Henry Dun; and, upon that title, purſued an action of mails and duties againſt the tenants.

Compearance was made for the Earl of Galloway, who produced a ſeiſine in the lands of Belſcroft, in 1684, proceeding on the precept of Henry Dun; and contended, that, as he and his predeceſſors had poſſeſſed the lands immemorially, the proceſs was incompetent, till his titles ſhould be reduced in a proper action.

Anſwered for the purſuer: The adjudication is a ſufficient title againſt the tenants, Stair IV. 22. 7. They are the only defenders called. The compearance of the Earl, indeed, produces a competition, but it is a rule of law, that all competitions imply mutual reductions. Nor is the purſuer under any neceſſity of inſtructing the right of the predeceſſor, to whom his father was charged to enter. The only title produced by the Earl, is a ſeiſine upon the precept of that very predeceſſor, whoſe right he cannot object to, without cutting the branch upon which he himſelf ſtands.

Had he produced a diſpoſition, indeed, from Henry Dun, he muſt have been preferred to the mails and duties; but he produces no more than a ſeiſine; and a ſeiſine, without its warrant, cannot avail in a competition of real rights; Stair II. 3. 19.

Replied: Upon the footing of the infeftment 1684, the Earl has the benefit of a poſſeſſory judgment, for which purpoſe, the production of a ſeiſine is ſufficient; Stair, IV. 26. 3. and 4.; Bankton, II. 1. 33. p. 512. and IV. 24. 49.; Erſkine, IV. 1. 25. And it makes no difference that the ſummons was executed againſt the tenants only. Still the Earl was intitled to compear for his intereſt.

When

When a proceſs of reduction is brought, it will be time to conſider, whether the perſonal faculty of redemption granted to Henry Dun be not loſt by preſcription.

'The Lords ſuſtained the defences, and aſſoilzied from the proceſs of 'mails and duties, reſerving to the purſuer to inſiſt in a reduction 'of the defender's rights, and to the defender his defences, as ac-'cords.'

G. F.

Act. *Macqueen, Crosbie.* Alt. *Lockhart.*

No. XXX. *January* 21. 1766.

JOHN BARR, and others;

Againſt

JAMES CARR and others.

PACTUM ILLICITUM.

Combination for raiſing the Rate of Wages.

CERTAIN journeymen weavers of Paiſley framed a contract of co-partnery, bearing to be for carrying on a joint trade of manufacturing and ſelling ſilk and linen goods, and containing the following articles: That the number of partners ſhould not be leſs than 600; that the affairs of the company ſhould be managed by a praeſes, and 19 directors annually choſen, and other officers; that each partner ſhould pay 2 ſhillings at the commencement of the company, and a ſmall monthly ſum during its continuance, which was declared to be for 12 years, from 8th May 1764; that no dividend of the profits ſhould be made till the lapſe of that period; that, upon calling a general meeting of the company, the rate of wages might be fixed, under which no member ſhould be at liberty to work; that the ſhares ſhould be transferable under certain regulations; that the directors ſhould be at liberty to admit any number of additional partners upon certain conditions.

In the ſpace of a few days, the contract was ſigned by more than 600 perſons; and the co-partnery commenced under the denomination of the *Univerſal Trading Company of Paiſley.*

At length ſome of the members refuſed to pay up their contributions, and being charged upon the contract, inſiſted in a reduction of it, as being no other than a combination of manufacturers to raiſe their wages; and, therefore, illegal both at common law and by ſtatute.

Pleaded for the company: The inſtitution was deſigned for the laudable purpoſe of carrying on a joint trade with the ſavings of their induſtry,

induſtry, which ſeparately could not be turned to account by the individual members; and there is no law in Scotland which reſtricts the number of partners in a trading company.

It was not for the general intereſt of the company to increaſe the rate of wages; becauſe, though part of the members were journeymen weavers, many of them were of different profeſſions, ſome of them manufacturers, who had occaſion to employ journeymen. And it was not in their power to do it, becauſe the dealings of the company were not extenſive enough to enable them to employ any conſiderable number of journeymen, nor their ſtock large enough to maintain them without working, ſhould they be refuſed employment from the other manufacturers.

Anſwered: The number of partners, already above 600, and which may be increaſed to thouſands; the employment of the partners, almoſt all of them journeymen weavers, though a few perhaps may be maſters of a loom or two, which they let out for hire; and the trifling amount of their contributions, are ſo many proofs, that the co-partnery could not be intended for carrying on a trade, or meant for any other purpoſe, than as a cover to an illegal combination for increaſing the rate of wages. Indeed, by an expreſs clauſe of the contract, the partners are taken bound not to work under the rates which ſhall be fixed by the directors.

An inſtance of the ſame kind occurred in 1762, in the caſe of the Wool-combers of Aberdeen, who had entered into a ſociety, under pretence of raiſing a fund for the ſupport of the aged or diſabled perſons of their trade: But, as there was reaſon to believe that there were different purpoſes at bottom, the court found, 'That ſuch combinations 'of artificers, whereby they collect money for a common box, inflict 'penalties, impoſe oaths, and make other by-laws, are of dangerous 'tendency, ſubverſive of peace and order, and againſt law; and, there-'fore, prohibited and diſcharged the wool-combers to continue to act un-'der ſuch combination or ſociety for the future, or to enter into any ſuch 'new ſociety or combination.'

Reference was alſo made to the ſtatute 6. G. I. c. 18. § 18. as prohibiting the acting as bodies corporate, or raiſing transferable ſtocks without legal authority; though it may be doubted how far that ſtatute, commonly known under the name of the *Bubble Act*, is applicable to this queſtion.

'The Lords found, that the contract and agreement in queſtion was 'not intended for carrying on a manufacture, but is an illegal 'combination, and of dangerous tendency to ſociety. And there-'fore found the reaſons of reduction relevant and proven, and re-'duced and decerned accordingly; and found the defenders liable 'in the expence of extract.'

G. F.

Act. *Wight.* Alt. *H. Dundas.* Reporter, *Gardenſton.* Clerk, *Roſs.*

No. XXXI. *January* 21. 1766.

JOHN CAMPBELL-HOOK, Lyon King at Arms, and his Depute;

Againſt

JOHN COPLAND and JOHN M'COLL.

JURISDICTION

—of the Lyon Court over Meſſengers.

THE ſtatute 1587, c. 46. appoints Lyon King at Arms to hold two courts, upon the 6th of May and 6th of November, yearly, 'for 'all complaintes to be maid to him, upon the default of officiars in 'time cumming.'

For many years theſe courts had been little attended to. But, in 1763, Mr Campbell-Hook, Lyon King at Arms, reſolved to hold a court, and intimated his reſolution in the public news-papers, requiring all the meſſengers in Scotland to attend, for inſpection of their books of executions, for inquiring into the ſituation of their cautioners, and for payment of their annual dues, being 10 merks to the Lyon himſelf, and about half that ſum to his clerk; and *that* under pain of deprivation.

Many of the meſſengers attended at this court; others did not; and the Lyon deprived about 50 of them *de plano*, upon the following grounds: 1*mo*, That they had not attended the head-court. 2*do*, That they had not paid their bygone annuities. 3*tio*, That they had not compeared, in order to anſwer any complaint which might have been preferred againſt them, and to inſtruct that their cautioners were alive and ſolvent.

Moſt of theſe deprived meſſengers were re-admitted on their application; but two of them continued to act as formerly without applying; and, being charged on the decree, ſuſpended it as contrary to law.

Pleaded for the chargers: The preciſe limits of the juriſdiction of almoſt every court are fixed, not by ſtatute, but by cuſtom. The Lyon-court appears even to have been *introduced* in that manner. The firſt ſtatute which mentions it is 1587, c. 46. It proceeds upon the recital, that a great number of meſſengers had entered into that office, in a confuſed and uncertain manner. It reſtricts the number of meſſengers, including the Lyon and heralds, to 200 for all Scotland, and authoriſes ſuch meſſengers as ſhould be recommended by the court of ſeſſion, after an inquiry by certain commiſſioners for each ſhire.

The

The ſtatute alſo appoints caution to be taken from meſſengers, for obſervation of 'the injunctiones conteined in the end of this preſent 'act.'

Theſe injunctions do not appear in the printed editions of the ſtatutes, nor have they been diſcovered in the record. But it has been the immemorial practice to deliver a written copy of injunctions to every meſſenger at his admiſſion, one article of which requires, 'That he preſent his book, 'containing his executions, to the Lyon King at Arms, upon ilk 6th 'day of May, and 6th day of November yearly,' under pain of deprivation.

A clauſe is likewiſe inſerted in the bond of cautionry, for inforcing this attendance, and the payment of 10 merks yearly to the Lyon, with the ordinary dues to the clerk; and conſenting that failure in theſe articles ſhall be held to be a lawful cauſe of deprivation.

The act 1592, c. 127. renews the Lyon's power of depriving meſſengers, with advice of the Lords of ſeſſion; authoriſes him to exact caution; and ordains all judges to concur with him in executing the ſtatutes in his favour. And there is an act of the Lyon-court, 28th June 1630, aſcertaining the annual ſum to be paid to the Lyon; and appointing it to be ſpecified in the bonds of cautionry.

The act 1672, c. 21. declares, 'That the Lyon and his brethren he-'raulds are judges in all ſuch cauſes concerning the malverſation of meſ-'ſengers in their office, and are to enjoy all other privileges belonging to 'their office, which are ſecured to them by the laws of this kingdom, 'and according to former practice.'

Upon theſe grounds, it was pleaded, that the annual dues were exigible in virtue of uſage, ſanctified by ſtatute. That, as theſe trifling payments could not afford the expence of a proceſs, ſo they were exigible in a ſummary manner, in terms of the clauſe in the cautionary bond.

And though, in the ſpecial caſes mentioned in the ſtatutes 1587 and 1592, the conſent of the Lords of ſeſſion was made neceſſary, that is not to be extended to ordinary deprivations; the juriſdiction of the Lyon is founded on cuſtom as well as ſtatute, and many inſtances of deprivation, by his own authority, were pointed out from his books. Theſe ſentences have been reſpected by the court of ſeſſion, and executions by meſſengers deprived by the Lyon found null, as in the caſe 18th February 1732, Hunter *contra* Montgomery, *Dictionary*, *v. Conſuetude*. In other caſes, indeed, the execution has been ſuſtained, where the party had been in *bona fide*, and upon the principles of the law *Barbatius Philippus*, *l.* 3. *D. de Off. Praet.*

There may be a hardſhip in obliging meſſengers to attend the courts *perſonally*; but there is no hardſhip in their attending by a procurator; and the advertiſement in the news-papers was not intended to ſupply the want of citation. It was meant to put the meſſengers on their guard; but there was no neceſſity for a citation, as they are bound to attendance upon the courts by ſtatute and by cuſtom, as well as by the expreſs clauſe in the injunctions, and bond of cautionry.

Anſwered: The only ſtatutes reſpecting the juriſdiction of the Lyon King at Arms, are thoſe of 1587, 1592, 1672; and, except in one ſpecial caſe, none of them give him any power of depriving meſſengers.

On

On the contrary, the two firſt require, that he ſhall proceed with the advice of the court of ſeſſion; and the laſt, which relates chiefly to his juriſdiction in matters concerning bearings armorial, contains only a general clauſe, and cannot extend his powers beyond the limits of the preceding ſtatutes.

There is nothing in thoſe ſtatutes which can juſtify any of the grounds of deprivation reſorted to in this caſe. There is no law, which obliges meſſengers to attend the Lyon's two head courts. In the caſe, indeed, of a complaint againſt any particular meſſenger, relevantly laid, and executed upon a charge of 15 days, the party complained on is bound, by the act 1587, to attend at the courts to be held upon the 6th of May, or 6th of November, and may be deprived by the ſentence of the Lyon. But, in this caſe, there was no complaint againſt the ſuſpenders; nor, at any rate, could an advertiſement in the news-papers be held as a proper ſervice of ſuch complaint.

The claim for the annuities in uſe to be exacted from meſſengers, cannot be ſupported upon the acts of the Lyon-court, which, had they been conſented to by the whole body of meſſengers at the time, could go no farther than to bind thoſe who conſented to them. And no argument can be drawn from the form of the bonds of cautionry, or of the injunctions which the Lyon delivers to meſſengers; for theſe, in ſo far as not ſupported by ſtatute, are but ſo many uſurpations of a power not founded in law; a power of impoſing a tax, which, by the principles of the conſtitution, is confined to the legiſlature itſelf.

And as to the compulſitor by deprivation, which the Lyon has exerciſed for inforcing payment of thoſe annuities, it ſeems to have been reprobated by the ſupreme court. For, in the only inſtance where the queſtion appears to have occurred, the execution of a meſſenger was ſuſtained, though he had been deprived by the Lyon, it being for no malverſation, but for a deficiency in the payments demanded by the Lyon; 11th July 1699, Learmonth *contra* Gordon.

'The Lords found the decree of deprivation irregular and void; and 'ſuſpended the letters *ſimpliciter*.'

G. F.

Act. *Lockhart*, *Coſmo Gordon*. Alt. *Crosbie*. Reporter, *Kennet*.

No. XXXII.

No. XXXII. *February* 18. 1766.

ANDREW BURNET;

Againſt

ALEXANDER BANNERMAN.

JUS TERTII.

If a Perſon not intitled to ſerve, can object to a Service?

THOMAS BURNET of Kirkhill diſponed thoſe lands, and certain ſalmon-fiſhings on the river Dee, to truſtees, for the behoof of Alexander Bannerman, his nephew.

Andrew Burnet writer to the ſignet, brother to Thomas, in the view of bringing a reduction of the ſettlement, ſo far as reſpected the fiſhings, which he conſidered as limited to heirs-male, took out brieves for ſerving heir-male in general to Thomas, before the bailies of Edinburgh.

Alexander Bannerman objected to the ſervice, upon the ground that there was a nearer heir-male in exiſtence, the ſon of another brother, elder than Andrew; and the bailies allowed him a proof, and granted commiſſion.

Andrew Burnet advocated the brief; and, upon a remit to the macers, *pleaded*, 1*mo*, No more was neceſſary for him, but to prove that he was habit and repute neareſt and lawful heir-male. *That* being proved, his ſervice muſt proceed, and cannot be interrupted by a perſon who has neither taken out brieves to ſerve, nor ſo much as pretends to be heir-male. Upon the exiſtence of a nearer heir, the claimant's ſervice may indeed be ſet aſide by reduction; but it is no reaſon to ſtop the ſervice, that the objector has right to the ſubjects by diſpoſition. It is ſtill *jus tertii* for him to found upon the right of another; and, were that allowed, every ſervice might be ſtopped upon allegations of the ſame kind.

2*do*, All objections to a ſervice muſt be inſtantly verified, and no terms can be allowed for proving exceptions; Stair, III. 5. 33.; Bankton, III. 5. 24. & 30.

Anſwered for the objector, to the 1*ſt*: The declared purpoſe of the claimant's ſervice is, to bring a reduction of the diſpoſition of the fiſhings in favour of the objector, who, therefore, has a clear *intereſt* to oppoſe the ſervice. And he has a *legal* intereſt to oppoſe it, as was found, 19th June 1746, Kennedy *contra* Erſkine, obſerved by Falconer, where one, in poſſeſſion of an eſtate, which was attempted to be evicted from him upon titles made up by adjudication on a truſt-bond, was allowed

to object that the perſon, againſt whom the adjudication was led, was not the neareſt heir; and that there was a nearer heir exiſting.

To the 2*d*: The deſign of the brieve of mortanceſtry is to diſcover who is the neareſt heir. Should it happen to conſiſt with the knowledge of the jury that there is a nearer heir than the claimant, they would be bound in duty not to ſerve. In like manner, if, upon reading the brief, any perſon ſhould give evidence of the exiſtence of a nearer heir, they could not proceed; and this is preciſely the preſent caſe, with this material difference, that the objector has a clear intereſt to object to the ſervice, ſince otherwiſe he might be obliged to enter into a litigation with the claimant; and, after prevailing over him, would have the battle to renew with the true heir, who could not be barred by any former proceedings to which he was no party.

The authorities referred to, prove no more than that no exception can be admitted againſt the form of the brief, but thoſe ſpecified in the ſtatute 1503, c. 94. ſo as to prevent the jury from proceeding to take cogniſance of it. But ſtill it is incumbent on the claimant to inſtruct his propinquity, which he cannot do, if the exiſtence of a nearer heir be proved. It is impoſſible that the objector ſhould be debarred from leading that proof; and Lord Stair plainly ſuppoſes the competency of it, III. 5. 30. & 35.

In the firſt of thoſe paſſages, he mentions a caſe where the Lords granted warrant to the director of chancery to delay iſſuing brieves, unleſs they contained a clauſe for citing the party having intereſt.

Replied, upon the 1*ſt* point: The brief of mortanceſtry is granted at the ſuit of the claimant, and cannot be adjourned without his conſent; Balf. p. 419. c. 3. In ſpecial ſervices, indeed, parties having intereſt have, from reaſons of expediency, been allowed to object, though they had not taken out brieves in their own names, as in the caſe mentioned by Lord Stair, III. 5. 30.; and, in that of Kennedy *contra* Erſkine, where titles were attempted to be made up by an adjudication on a ſpecial charge, which is equivalent to a ſpecial ſervice.

But the preſent queſtion relates to a *general* ſervice, where no perſon is admitted to object, unleſs he has actually taken out brieves. The diſtinction is clearly laid down in a deciſion, 26th February 1681, Laird of Strowan *contra* the Marquis of Athole. Strowan had taken out brieves to ſerve heir general and ſpecial to his predeceſſors. The Marquis objected, on the ground that the ſervice was intended to diſturb him in the poſſeſſion of the lands. 'The Lords allowed him to be heard as to the '*ſpecial* ſervice, but not as to the *general* ſervice.'

Replied upon the 2*d* point: Were there here a competition of brieves, there might be ſome ground for allowing time to prove. But, if it was competent for third parties to ſtep in, and, upon pretence of the exiſtence of a nearer heir, to offer a proof, no ſervice ever could proceed within any reaſonable compaſs of time. By theſe delays, the claimant might be eſſentially hurt; but neither the nearer heir, nor any other perſon having intereſt, can ſuffer any prejudice from allowing the ſervice to proceed, which may be ſet aſide by reduction ſo ſoon as the nearer heir appears.

'The

'The Lords refuſed to allow a proof to ſtop the ſervice; reſerving 'the objections as accords.'

G. F.

Act. *Rae, Wight.* Alt. *Lockhart.* Reporter, *Coalſton.*

No. XXXIII. *June* 13. 1766.

MALCOLM HAMILTON;

Againſt

JOHN CARLISLE, and JAMES DUNLOP.

LETTER OF CREDIT.

Intimation of the Advances, if neceſſary?

IN 1762, James Douglas, merchant in Glaſgow, wrote to Malcolm Hamilton of London, that he wanted to raiſe L. 500, by drawing bills on London at long dates, and remitting bills at ſhort dates to replace them, and aſked leave to draw on him for that purpoſe, promiſing to get the ſecurity of John Carliſle and James Dunlop, with whom he was engaged in a copartnery trade.

The propoſal was agreed to, and a letter ſubſcribed by Carliſle and Co. referring to Douglas's letter; and engaging their ſecurity for ſuch ſums as Douglas ſhould draw for.

In January 1763, Malcolm Hamilton, who had hitherto traded by himſelf, aſſumed a partner into his houſe, but continued to anſwer the bills drawn by Douglas, as he had done before, till Auguſt 1763, when he was in advance of about L. 608.

Carliſle and Co. ſtopt payment in November 1763, and Douglas accepted bills for the balance due; but he having alſo failed, Malcolm Hamilton brought an action againſt John Carliſle and James Dunlop the guarantees.

Pleaded in defence: The defenders are not liable for the bills drawn by Douglas, in reſpect they were not intimated to them. And, admitting that it was not neceſſary to intimate every individual draught, yet intimation ought to have been made, when any material circumſtance occurred, ſuch as might have led them to withdraw their ſecurity, or warned them to look to their relief. Two periods were condeſcended on, the one when Malcolm Hamilton aſſumed a partner in January; the other, when his dealings with Douglas came to an end, in Auguſt 1763.

Anſwered:

Answered: The pursuer could be bound no farther than to comply with the conditions of the mandate. But the letter contains no clause requiring intimation of the advances, of which the defenders, the partners of Douglas, could not be ignorant. And there was no reason for a particular intimation, upon the pursuer's assuming a partner, which made no alteration upon the credit.

'The Lords found, that the letter of credit libelled on granted by the 'defenders, extends only to the sum of L. 500 Sterling, and that 'the company is liable to that extent.'

G. F.

Act. *Lockhart, Geo. Wallace.* Alt. *Montgomery, Wight.*

No. XXXIV. *June* 13. 1766.

WALLACE, GARDYNE, and Co.;

Against

PATRICK MILLER, and others.

LOCUS POENITENTIÆ,

—when a Bargain is agreed to be completed by Writing.

MESSRS. Gibson & Balfour, and Patrick Miller, were engaged with John Weir in a copartnery for selling and bleaching linen, under the designation of John Weir and Co.

In May 1766, Wallace, Gardyne, and Co. of Arbroath, sent a parcel of linens to be bleached by John Weir and Co.; and, upon the 7th of that month, made offer to sell them the cloth at certain prices, upon two months credit.

By this time, the copartnery of John Weir and Co. was dissolved, which John Weir mentioned in his answer of 16th May; and, at the same time, offered to take the linens upon his own account, on condition that the credit should be enlarged to 4 months.

Wallace, Gardyne, and Co. agreed to the condition, by letter of the 17th, adding, 'You may compute the amount, and send us your acceptance, 'payable in 4 months;' with a postscript in these words: 'Since writ-'ing, we have made out an invoice of the linens, amount L. 426:18:11; 'for which, if found without error, you may send us your accep-'tance.'

Upon the 23d of May, Messrs Miller and Gibson & Balfour protested and registered certain bills due by John Weir. Upon the 24th, a meeting

meeting of his creditors was held; and, that ſame day, Weir wrote to Wallace, Gardyne, and Co. explaining the ſituation of his affairs, and aſking their directions as to the bleaching of the linens, which he now declined purchaſing.

Theſe linens were pointed by Meſſrs Miller, and Gibſon & Balfour, upon the 1ſt of June, as creditors to John Weir, and claimed by Wallace, Gardyne, and Co. as their property.

Pleaded for the defenders: The contract of ſale is completed by mutual conſent, and, in ſales of moveables, writing is unneceſſary. This conſent was ſignified by the letter of 16th May on the one hand, and the letter of 17th May on the other. Nor is it of any conſequence, that Weir had not tranſmitted an acceptance for the price; that cannot be conſidered as a circumſtance eſſential to the bargain; the purſuers demanded no additional ſecurity, but had betaken themſelves to the credit of Weir alone.

Anſwered: When it is agreed that a contract ſhall be completed by writing, there is *locus poenitentiae* till that writing be delivered. The contract, therefore, was never completed in this caſe, as the acceptance was never granted. But, even allowing the contract to have been completed, and the property transferred, Weir was bound in juſtice to give up the bargain, when he knew himſelf to be utterly inſolvent. Accordingly, he did give it up by his letter of 27th May; and the proteſting and regiſtrating his bills the day before, did not make him a notour bankrupt, or invalidate that act, even ſuppoſing it to have been neceſſary for the ſecurity of the purſuers.

'The Lords found, That the ſale of the cloth to Weir was never completed, and repelled the defence.'

G. F.

Act. *Dav. Graeme.* Alt. *Wight.*

No. XXXV. *June* 14. 1766.

JANET ANDERSON;

Againſt

ALEXANDER DONALDSON and others.

HERITABLE AND MOVEABLE.

Proviſion to a Daughter payable Year and Day after her Marriage.

THOMAS ANDERSON, in his contract of marriage, became bound, in the event of there being *three* daughters, to pay them 30,000 merks, viz. '12,000 to the eldeſt, 10,000 to the ſecond, and 8000 merks 'to the third.'

Theſe proviſions were made payable within year and day, after the marriages of the reſpective daughters; but there was no clauſe of annualrent.

Four daughters exiſted of the marriage. Janet the youngeſt, married Robert Nicol, 27 March 1725.

Eliſabeth, the ſecond daughter, obtained an adjudication of certain tenements belonging to the father, for her 10,000 merks, 19th January 1726.

Janet brought a proceſs in 1727, againſt her father, and her three ſiſters, for a ſhare of the 30,000 merks, and obtained decree in 1729, for 4500 merks as her portion; ſo as that 1500 merks ſhould be taken from the ſhares of each of the elder ſiſters, who were decerned to make payment thereof to Janet, and her huſband, for his intereſt. See the deciſion, *Dict. Implied Will*, § *ult.*

In a ranking and ſale of the ſubjects in 1732, Geddes of Scotſtown was preferred, *ſecundo loco*, on Eliſabeth's adjudication to which he had right; but under the burden of the 1500 merks decerned to be paid to Janet.

Scotſtown, having become purchaſer at the ſale, diſponed the ſubjects to Alexander Donaldſon and others.

After Robert Nicol's death, Janet his widow, brought an action of mails and duties for payment of the 1500 merks.

The defender did not diſpute the principle, that diligences, led by the perſon *in titulo* for the time, accreſce to the true proprietor. But he maintained, that Janet had no right to the ſum, which being payable year and day after her marriage, and not bearing annualrent, was moveable, and belonged to her huſband, *jure mariti.*

Eliſabeth's

Eliſabeth's adjudication was led after the marriage. If, therefore, it accreſced to the 1500 merks, the accretion took place in favour of the huſband to whom the debt belonged, and could not operate *retro*, ſo as to make the debt heritable before the adjudication was led, and deprive the huſband of his *jus quaeſitum* in the ſum.

Anſwered: *Dies incertus habetur pro conditione.* The proviſion was payable year and day after the purſuer's marriage: The purſuer might have died before that period; and, in that event, the 1500 merks would have remained with Eliſabeth; but the adjudication was obtained within 10 months of the purſuer's marriage. By that means, the whole 10,000 merks became heritable, ſo that the 1500 merks, eventually due to the purſuer, was heritable, not only before it was exigible by the purſuer, but before the *jus crediti* was veſted in her perſon.

'The Lords found, That the purſuer, in virtue of the decreet 1729, is 'intitled to the ſum of L. 1000 Scots, as a part of the portion of '10,000 merks provided to her ſiſter Eliſabeth, by their father's 'contract of marriage, for which Eliſabeth adjudged his eſtate in 'the year 1726; and that the purſuer is intitled to inſiſt for a de-'creet of mails and duties againſt the ſaid tenements, for ſuch part 'of the accumulated ſums contained in the adjudication, as ſhall ap-'pear to ariſe from the ſaid L. 1000 Scots, and intereſt thereof ad-'judged for; and decerned in the mails and duties accordingly.'

G. F.

Act. *Ja. Ferguſon*, jun. Alt. *Lockhart*.

No. XXXVI. *June* 18. 1766.

KENDAL and Co.;

Againſt

COLIN CAMPBELL of Inverliver.

PROOF.

How far a written Contract can be ſupplied by Witneſſes?

IN a minute of ſale of woods to a company, there was a reſervation of a certain part. The ſeller inſiſted, that another part of the woods was alſo agreed to be reſerved, and that it had not been valued along with the reſt, though it was omitted in the reſervation in the minute, and was not mentioned in a ſubſcribed notandum afterwards added.

This allegation he offered to prove by the witneſſes preſent at the communing,

communing, and by the perſons who had valued the woods; or, at leaſt, by reference to the oath of the company's agent at the time, and who had himſelf an intereſt in the queſtion, as having right to a proportion of the ſhare of one of the partners, though he was no longer employed as agent for the company.

'The Lords having conſidered the minute of agreement, with the 'ſubſcribed *nota bene*, poſterior to the minute, and ſupplying an o- 'miſſion therein, but making no addition to the reſervation; and 'alſo, conſidering how dangerous it would be to cut down a writ- 'ten agreement by parole-evidence, found the defender liable for 'the price of the whole woods in queſtion.'

G. F.

Act. *Hay Campbell.* Alt. *Lockhart.*

No. XXXVII. *June* 24. 1766.

Sir JOHN SINCLAIR;

Againſt

The COUNTESS *and* EARL FIFE.

SUCCESSION.

Neareſt Heir-male of Line whatſoever.

ALEXANDER Earl of Caithneſs, by a ſtrict entail, deviſed his own eſtate, and alſo the eſtate of Murkle, in which he had ſucceeded to his brother Lord Murkle, to himſelf and the heirs-male of his body; whom failing, to his brother Francis, and the heirs-male of his body; whom failing, to the ſecond and younger ſons, ſucceſſively, to be procreated of the body of Lady Dorothea his daughter; whom failing, 'to George 'Sinclair of Woodhall, Eſq; one of the ſenators of the college of ju- 'ſtice, and the heirs-male of his body; whom failing, to the ſaid George 'Sinclair, his *neareſt lawful heir-male of line whatſoever;* whom fail- 'ing, to his own neareſt heirs and aſſignees whatſoever.'

The title and honours of Caithneſs were deſcendible to heirs-male, and failing his own and his brother's male iſſue, devolved upon remote heirs not called in the entail, and whom the Earl did not mean to favour. This led him to inſert a clauſe, That, excepting the heirs of his own body, his brother Francis, and the heirs-male of his body, the whole heirs ſucceeding to the eſtate ſhould bear the name and arms of Sinclair

of

of Murkle only; and ſhould forfeit their right upon ſucceeding to any title of peerage.

Lord Woodhall was the third ſon of the family of Stevenſton. Sir Robert, the eldeſt, had died leaving male iſſue; John Lockhart of Caſtlehill, the ſecond, was alſo dead, and had left only daughters. Patrick Sinclair, the fourth, was a bachelor.

After the execution of the deed, Francis Sinclair, Lord Woodhall, and Patrick Sinclair, all died without iſſue. The Earl alſo died, leaving iſſue a daughter, Dorothea Counteſs Fife, who was as yet childleſs.

Sir John Sinclair, eldeſt ſon of Sir Robert Sinclair of Stevenſton, apprehending himſelf to be called under the deſcription of neareſt heir-male of line whatſoever to Lord Woodhall, purchaſed brieves for ſerving neareſt and lawful heir of tailzie and proviſion in general to the Earl of Caithneſs.

Lady Fife likewiſe took out brieves for ſerving heir of tailzie and proviſion to the Earl, under the laſt ſubſtitution in the tailzie; and a competition enſued.

Pleaded for the Counteſs: The expreſſion *heir-male of line whatſoever*, has no meaning in the law of Scotland. *Heir-male* denotes one ſpecies of heir, *heir of line* denotes a different ſpecies of heir; and the two joined together amount to a contradiction in terms, as much as if the ſame perſon had been called under the double deſcription of heir-male and heir-female; ſo that the clauſe muſt be held *pro non ſcripto*.

But, if the expreſſion has any meaning, it cannot denote either the heir-male, or the heir of line, but a perſon in whom both characters are united. It is as impoſſible to conceive an heir-male of line, who is not heir of line, as an heir-male of line, who is not heir-male. Had the expreſſion been Lord Woodhall's 'heir-male, *being* his 'heir of line,' there could not have been a doubt in the caſe, and the expreſſion actually uſed, is, in effect, the ſame, though more conciſe. The intention may have been to call ſuch of Lord Woodhall's heirs-male, as ſhould be alſo his heirs of line; and, failing them, to give place to the Earl's daughter. Sir John Sinclair is neareſt heir-male to Lord Woodhall, but he is not heir of line; that character is in the daughters of John Lockhart of Caſtlehill, who are equally intitled to claim under the ſettlement to heirs-male of line, being only heirs of line, as Sir John Sinclair is, being only heir-male. Both of them have one of the characters in the deſcription; and neither has the complete character.

Anſwered: *Heir of line*, and *heir-male*, when ſet in oppoſition to one another, are, no doubt, deſcriptive of different perſons. But there is another ſenſe in which the denomination of heir of line is underſtood in the law; and the whole argument of the Counteſs proceeds on overlooking that diſtinction.

In the ſucceſſion of brothers, there is a double repreſentation in the ſame degree. The ſucceſſion divides: The conqueſt goes to the immediate elder brother, who is *heir of conqueſt*; the heritage goes to the immediate younger brother, who is *heir of line*, or *heir-male of line*.

In this caſe, the *perſona praedilecta* was Lord Woodhall. Failing his iſſue, the ſucceſſion was to devolve upon his collateral heirs-male. Had

 the

the deed been expreſſed in theſe terms, there might have been a doubt whether the eſtate was conqueſt in the perſon of Lord Woodhall, or heritage; and, of conſequence, whether it ſhould devolve upon his heir of conqueſt, or his heir of line. The Earl choſe to devolve it upon Patrick Sinclair, the younger brother of Lord Woodhall, the *heir of line*, preferably to Sir John Sinclair, the ſon of the eldeſt brother, the *heir of conqueſt*. In that view, failing iſſue male of Lord Woodhall, he very properly ſubſtituted his *heir-male of line* whatſoever, thereby calling the heir of line in preference to the heir of conqueſt.

Had Patrick Sinclair ſurvived the Earl, he would have taken the eſtate as neareſt heir-male of line of Lord Woodhall; and excluded Sir John Sinclair the heir of conqueſt, who, by the death of Patrick, having become heir-male of line, is clearly intitled to the ſucceſſion.

'The Lords preferred Sir John Sinclair, and found that he is intitled 'to be ſerved heir of proviſion, under the ſettlement of the de-'ceaſed Alexander Earl of Caithneſs, and repelled the objections 'to his ſervice.'

G. F.

For John Sinclair, *Lockhart, Macqueen, H. Dundas.*
Alt. *Burnet, Rae, Ja. Ferguſon.* Clerk, *Roſs.*

No. XXXVIII. *June* 25. 1766.

DUKE of BUCCLEUGH;

Againſt

VINT, and others.

Thirlage.

THE lands and barony of Dalkeith belonged antiently to the Earls of Morton; and were diſponed by them to the family of Buccleugh, about the year 1642.

Theſe lands had been erected into a barony and a regality; and, in the Duke's charter, the village of Dalkeith is declared to be the borough of regality, and all the juriſdictions, rights, and privileges, pertaining to any barony or Lord of regality, are conferred in the moſt ample form.

The families of Morton and Buccleugh had ſucceſſively feued out certain portions of land in and about this village, and the vaſſals had been in

in uſe to grind their malt at the mills of Dalkeith. Some of them having carried their malt to other mills, a proceſs of abſtraction was brought by the Duke of Buccleugh, who contended that he was intitled to multure upon all malt conſumed within the barony.

Pleaded for the purſuer: 1*mo*, He has an expreſs grant of this barony and regality, with all the privileges that attend ſuch grants; and the charters from the crown, for ages back, have contained the following conſtitution of the aſtriction: 'Totas et integras terras, dominium, 'baroniam, villam, et burgum baroniae de Dalkeith, cum totis liberta-'tibus, et una cum molendinis de Dalkeith, tum granarum quam fulo-'num, cum multuris dict. molendinorum, granarum, et terris molen-'dinariis integrorum eorund. molendinorum reſpectivé.' So that the Duke has the moſt ſolid of all titles conſtituting the thirlage over the feuers and inhabitants of the village to the mills of Dalkeith; and ſuch a title, joined with poſſeſſion, is held as a ſufficient conſtitution of the aſtriction. See, 4th January 1740, Fletcher of Bonſhaw *contra* Brown of Glaſwell; and Earl of Hopeton *contra* the brewers of Bathgate in 1752.

2*do*, The vaſſals, particularly thoſe deriving right from the family of Buccleugh, are all expreſsly aſtricted by a clauſe of the following tenor in their charters: 'Ac etiam praefatus ejuſque an-'tedict. ſeu tenentes ac poſſeſſores dict. tenementorum, aliorumque, a-'ſtringentur molendinis de Dalkeith, et tenebuntur *molere omnia ſua* '*grana*, (ſometimes only *ſua grana*,) in iiſdem molendinis, ac perſolvere 'multuras, aliaſque divorias, debitaque ſervitia pro iiſdem pro rata, ſi-'cuti caeteri feudifimarii tenentes, et inhabitantes dict. burgi de Dal-'keith, perſolvere et praeſtare in uſu ſunt vel fuerunt.' This aſtriction, from the nature of the tenements, which are moſtly a houſe and a yeard, or a houſe only, muſt import a thirlage of *invecta et illata*, though all that is here demanded is multure for what is conſumed within the town. See Lord Bankton, L. II. t. 7. p. 688.; Mr Erſkine, L. II. t. 9. § 16; and Hamilton *contra* Miller, 27th December 1717, reported in Dictionary, vol. 2. p. 466.

Some of the old charters bear a reddendo *pro omni alio onere*; but that cannot have the effect to liberate the vaſſals from thirlage; for, in the *firſt* place, the court has repeatedly found, that ſuch a clauſe will not free from aſtriction, without a clauſe *cum molendinis et multuris*, 17th July 1629, Lord Newliſton; 26th November 1631, Oliphant; and, in the late caſe, in 1752, of Lord Hopeton *contra* the brewers of Bathgate.

But, in the *ſecond* place, even though the feuers had got their original charters without any clauſe of aſtriction, yet, whatever exemption they might have had originally, they have loſt it now, by taking their charters with the aſtriction for above 100 years back, and paying multures to the mill during that time.

3*tio*, Beſide theſe clauſes of aſtriction in his own and his vaſſals title-deeds, the Duke has acts of the barony and regality courts, eſtabliſhing the aſtriction, and ordaining that all corns, tholeing fire and water, within the borough, ſhould pay multure at the mills thereof: Theſe acts both found a title, and prove poſſeſſion, no contrary practice being proved; and, though poſſeſſion alone will not conſtitute a thirlage without a title,

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yet this title is attained as well by acts of court as by charters, both which occur in the preſent caſe.

4*to*, Theſe three titles of aſtriction, any one of which would have been ſufficient, have been ſupported by an immemorial poſſeſſion on the part of the Duke, as appears not only from a variety of ſentences pronounced againſt ſuch as abſtracted their grain from the mills of Dalkeith, by the barony and regality courts, but alſo from the expreſs acknowledgement of the defenders in this caſe, who admit that they and their predeceſſors have immemorially grinded their malt at the Duke's mills. Neither can the vaſſals coming to the mill be conſidered as *voluntatis et non neceſſitatis*; for, where there is a regular conſtitution of the thirlage in the charters, ſupported by repeated acts of court, the acknowledged uniform practice of grinding their malt at the mill will, in law, be imputed to their ſubjection, and not to their choice; to their obedience, not to their civility. And, though it appears that the maltſters in Dalkeith had been in uſe of making malt for ſale, without the thirle, and alſo for the gentlemen in the neighbourhood, without payment of any multure; yet, whatever effect that might have in a general claim, for a thirlage of *invecta et illata*, it can have no influence in the preſent claim for the multure of what is grinded, brewed, and conſumed within the thirle, eſpecially as it does not appear that this uſage was known to the Duke or his managers; at the ſame time, as, in general, the title-deeds of the inhabitants contain an aſtricting clauſe, the defenders not producing their title-deeds, ſhows that they contain the ſame clauſe; and, conſequently, they could not preſcribe a right contrary to their own titles; Lord Bankton, L. I. t. 7. p. 689.

Anſwered by the defenders, to the 1*ſt*: Even ſuppoſing the clauſe *cum molendinis et multuris* in the Duke's charter, could conſtitute a thirlage over the Duke's *property* lands, yet, with regard to lands belonging to *vaſſals*, who had, *ab ante*, obtained charters containing no aſtriction, but a reddendo *pro omni alio onere, exactione, et ſervitio ſeculari*, it could only carry the right of ſuperiority, but would not eſtabliſh any aſtriction upon them. But, it is apparent that the clauſe, *cum multuris*, in the Duke's charter, was not meant to conſtitute or convey any thirlage; it is a clauſe contained in every charter diſponing lands and a mill, and will carry multures ariſing from prior aſtrictions, but can never be underſtood to conſtitute a thirlage which was not before in exiſtence. The only proper way of conſtituting an aſtriction is by a ſpecial agreement with the proprietor, whoſe lands are to be thirled, or by making the aſtriction a condition or burden in the original charter. This clauſe, therefore, in the Duke's charter, could not conſtitute, and was not meant to conſtitute, any thirlage; but only to give the Duke's predeceſſor an ample right to the lands and mill in common form.

To the 2*d* title of aſtriction founded on: That it does by no means appear, that the vaſſals feu-rights do generally contain a clauſe of aſtriction, either *quoad omnia ſua grana*, or *quoad ſua grana*. The moſt ancient feus granted by the family of Morton, which have been recovered, either bear no ſpecial reddendo, but refer to the former rights, or contain a certain reddendo, *pro omni alio onere, exactione, aut ſervitio ſeculari*; and, though ſome of the later charters, particularly thoſe granted

ed by the family of Buccleugh, contain the clauſe of aſtriction founded upon by the Duke; yet, as to this, in the *firſt* place, the defenders can by no means allow, that it is either juſt or lawful for a ſuperior, when he renews inveſtitures, to throw clauſes into charters, containing burdens not mentioned in the original rights; but, in the *ſecond* place, as from the writs produced, it appears that the feu-rights, granted by the family of Morton, do not uniformly contain a clauſe of aſtriction, it is incumbent on the Duke to prove, that the particular ſubjects, poſſeſſed by the defenders, are, by their own rights, liable in a thirlage of *invecta et illata*, as there is no ground for alledging that the town in general is ſubject to ſuch thirlage.

At the ſame time, even though it were true, that the charters uniformly contained an aſtriction of *ſua grana*, or *omnia ſua grana*; yet that would not ſubject the defenders to a thirlage of *invecta et illata*. In ſome caſes, where there was no landward property, the court have found, that an aſtriction of a village was of the *invecta et illata*, becauſe there were no *termini habiles* for any other aſtriction: But there is no room for any ſuch preſumption in the preſent caſe, as the original feus conſiſted of ten, twenty, or thirty acres of land; ſo that a thirlage of grindable grain, or, at moſt of *grana creſcentia*, could only be underſtood; and the practice of the maltſters, in making malt for the gentlemen in the neighbourhood, and ſelling malt without paying any multure, ſhows clearly, that a thirlage of *invecta et illata* was never underſtood to be implied under the words *ſua grana* in ſome of the charters.

It is objected, that it has been often found, that a charter containing a reddendo *pro omni alio onere, exactione, aut ſervitio ſeculari*, does not import a liberation from thirlage; but all that theſe deciſions import is, that ſuch a reddendo, without the clauſe *cum molendinis et multuris*, does not imply an exemption from a thirlage formerly conſtituted, though the direct contrary was found in ſome of the later caſes mentioned in the Dictionary, under the ſame title, agreeably to the doctrine laid down by Lord Stair, L. II. tit. 7. § 17. But the queſtion here is not, whether ſuch a clauſe would liberate from a thirlage, previouſly and formally conſtituted, but, whether or not there has been a thirlage of *invecta et illata* conſtituted upon the aggregate body of the feuers and inhabitants of Dalkeith, which appears evidently not to have been the caſe, both from the charters produced, and from the practice of the maltſters, who paid no multure for the malt which was made and ſold out of the thirle, and only out-town multure for what they brought to be grinded at the mills of Dalkeith.

As to the *third* title of aſtriction founded on by the Duke of Buccleugh, the acts of the barony and regality courts, the defenders have no occaſion to diſpute, that acts of a baron-court may be available to conſtitute a preſcriptive right of thirlage over thoſe who are ſubject and liable to the acts of court; but this can have no influence in the preſent caſe, when this ſingle circumſtance is attended to, that all the acts of court referred to, are ſome hundred years poſterior to the original feus granted by the family of Morton; and, if the vaſſals were not in theſe ſubjected to ſuch a thirlage, it will be difficult to maintain that the ſuperior, by after acts of his court, could ſubject his vaſſals, or thoſe

poſſeſſing under them, to ſuch an oppreſſive thirlage, in direct contradiction to the tenor of their rights, eſpecially as ſuch acts paſs in abſence of the feuers, though their conſent is conſidered to be abſolutely neceſſary; Lord Stair, L. II. t. 7. § 16.

With regard to the decreets of the baron-court, which are referred to as evidence of the poſſeſſion of the thirlage here claimed, it is to be obſerved, that theſe ſentences, at the ſame time that they were illegal and oppreſſive, do by no means apply to the preſent queſtion; becauſe it does not appear from them that the perſons complained of were feuers and inhabitants of the village. It is more probable that they were tenants of the property lands, and aſtricted to the mill by their tacks.

The next evidence of poſſeſſion upon which the Duke founds is, the acknowledgement of the defenders of their being in uſe to grind their malt at the Dalkeith mills; but, with regard to this, there is no principle of law more firmly ſettled than that the uſe of grinding at a mill, however conſtant and uniform, and for whatever length of time it may have taken place, will not of itſelf eſtabliſh a thirlage, and make that *neceſſitatis* which more naturally is *voluntatis*, from motives of intereſt and convenience. See Lord Stair, p. 302. And as, in this caſe, the Duke's mills of Dalkeith were the neareſt mills to the places of the defenders reſidence, and at which, from the conſtant ſupply of water, they were always certain of having ready ſervice upon payment of out-town multure only, which was conſiderably lower than at the other mills in the neighbourhood; in theſe circumſtances, the defenders coming with their malt to the mills of Dalkeith, falls more naturally to be conſidered as *voluntatis*, and not *neceſſitatis*, eſpecially as it is material to obſerve, that neither out-town multure nor mill-ſervices, which are the diſtinguiſhing characteriſtics of thirlage, were ever attempted to be exacted.

'The Lords found, that the purſuer has not inſtructed that the defenders in this cauſe, or the tenements in which they live, are ſubjected to the thirlage of *invecta et illata*; and, therefore, found that the defenders are at liberty to grind their malt where they chooſe.'

G. F.

Act. *John Dalrymple.* Alt.

No. XXXIX.

No. XXXIX. *June* 27. 1766.

Dr ROBERT HERRIOT;

Againſt

ALEXANDER FARQUHARSON, Truſtee for ADAM and THOMAS FAIRHOLME'S Creditors.

PROOF.

Acceſſion to a Truſt-deed, how relevant to be proved?

ACCESSION to a truſt-deed, was found to be ſufficiently proved, by letters from the creditors authoriſing their agent to concur with the acceding creditors, joined to the agent's attendance at their meeting, and concurring in their meaſures.

G. F.

Act. *Ilay Campbell.* Alt. *Macqueen.*

No. XL. *July* 16. 1766.

BAIRD and other Creditors of Primroſe;

Againſt

NEIL EARL of ROSEBERRY.

REPRESENTATION.

Heir of Proviſion, if liable in ſolidum?

IN the queſtion between theſe parties, marked in the principal collection, No. 17. 22d June 1765, after the entail had been found ineffectual againſt creditors, as not being recorded, it came to be diſputed, Whether the Earl was liable *in ſolidum*, for the whole debts, or only *in valorem* of the eſtate?

Pleaded for the creditors: The Earl had it in his power to have ſerved *cum beneficio*; but, in place of doing ſo, he choſe to ſerve heir of tailzie

tailzie and proviſion; and, therefore, now that the entail is ſet aſide, he muſt be liable for the whole debts.

Anſwered: An heir of proviſion is not an *heir* in the proper ſenſe of the word, he does not ſucceed *in univerſum jus*, but to the ſpecial ſubject provided; and, therefore, can only be liable *in valorem.*

2*do*, When the ſucceſſion opened to the defender, the tailzie was ſuppoſed to be effectual. For that reaſon, he did not think it neceſſary to ſerve *cum beneficio.* But, now that the tailzie has been unexpectedly ſet aſide, he muſt be conſidered in the ſame light, as if he had availed himſelf of that privilege, which he would have exerciſed, had he known that the eſtate was to be held in fee-ſimple.

'The Lords found the Earl only liable *in valorem.*'

G. F.

Act. *Lockhart, Sir David Dalrymple.* Alt. *Burnet.*

No. XLI. *July* 18. 1766.

WATSON;

Againſt

JOHNSTON.

FIAR.

Subject proceeding from the Wife, taken to the Spouſes in conjunct Fee and Liferent, and the heirs of the Marriage in Fee.

THE queſtion was, Whether the huſband or wife was fiar of the price of a tenement of houſes, which had been diſponed to the wife, redeemable by her brother for a ſum ſpecified, and by her diſponed, by poſtnuptial-contract, 'to her huſband, and herſelf in conjunct fee and liferent, and to the heirs of the marriage in fee.'

It ſeems to have been admitted upon both ſides, that the price, as a *ſurrogatum* to the ſubjects, was to be conſidered in the ſame light, as if the ſubjects themſelves had been *in medio.* And various deciſions were referred to for determining whether the fee was in the huſband or in the wife, all of which are abridged, *Dict. voce, Fiar.*

'The Lords found, that the fee was in the huſband.'

G. F.

For Watſon, *W. Wallace.* Alt. *Rolland.*

No. XLII.

No. XLII. *July* 19. 1766.

SPENCE;

Againſt

STEVENSON and others.

LEGITIM.

Proviſion in full of Legitim, the Grantee continuing a Bairn in the Houſe.

A Bond of proviſion was granted to a daughter 'in full of all ſhe 'could claim as legitim, bairns part of gear, or otherwiſe what-'ſoever; provided nevertheleſs, that ſhe ſhall be a bairn in my houſe, 'and have a part of my goods and gear the time of my deceaſe, my 'other daughters being firſt as well provided.'

The granter had no other daughters; but, by a teſtamentary deed, he veſted his moveables in truſtees for behoof of his daughter and her children, payable at their majority or marriage; which, on their death, before either of theſe events, were to devolve upon certain perſons particularly mentioned.

'The Lords found, that the clauſe in the bond of proviſion, by which 'the daughter accepts of it in full of her legitim or bairns part of 'gear, but under proviſo, that ſhe ſhall be a bairn in his houſe, and 'have a ſhare of his effects at his death, his other daughters being 'firſt as well provided, imports no more than that ſhe was to have 'no farther ſhare, until her ſiſters had got as much as ſhe; ſo that 'her claim for her bairns part of gear or legitim, as againſt her father, 'except in competition with her ſiſters, was left entire: And that 'the after ſettlement, being a *mortis cauſa* deed, is not effectual to 'exclude the legitim.'

G. F.

Act. *Montgomery.* Alt. *Ilay Campbell.* *Auchinleck*, Reporter.

No. XLIII. *July* 24. 1766.

JEAN and ELIZABETH HUNTERS;

Againſt

JANET BROWN.

HUSBAND AND WIFE.

What Deeds are extinguiſhed by Diſſolution of the Marriage within Year and Day?

ANDREW HUNTER, having returned from the Eaſt Indies in an infirm ſtate of health, diſponed, upon the narrative of pure love, favour, and eſteem, his whole effects to Janet Brown his betrothed wife, under the burden of his debts, and reſerving his own liferent, with a clauſe, whereby he excluded and debarred all his friends and relations from having any intereſt in the ſubjects.

Some days after, Andrew Hunter married Janet Brown, and died within eight months of the marriage, without iſſue.

Jean and Elizabeth Hunters his ſiſters, brought an action againſt Janet Brown for the value of the effects, arguing, that all proviſions granted in contemplation of marriage, were extinguiſhed by its diſſolution within the year, and without a living child.

In ſupport of the general propoſition, the purſuers referred to the authority of Balfour, p. 95. c. 12. and p. 112. c. 27.; Spottiſwood, tit. *Husband and Wife*, p. 157.; Craig, II. 22. 23.; Stair, I. 4. 19. with ſeveral deciſions, as 16th November 1633, Grant *contra* Grant; 16th July 1678, Ld. Burleigh *contra* Ld. of Fairnie; 26th February 1751, Somervel *contra* Bell.

It was argued, that the rule, being ſo firmly eſtabliſhed, muſt obtain in all deeds granted *intuitu matrimonii*, unleſs it be expreſsly excluded. And that this deed was granted *intuitu matrimonii*, was ſaid to appear from the deſignation of *betrothed wife*, which is applied to the grantee.

Anſwered: The forfeiture incident on the diſſolution of marriage within the year, and without iſſue, is rigorous and unfavourable; and, being introduced by cuſtom, ought not to be extended. But, neither practice nor authority has applied it to any other deeds, but thoſe which are granted in contemplation of marriage.

In the caſe of Bell *contra* Somervel, the deed proceeded on the narrative, 'That no marriage-articles had been executed,' and contained a proviſion

proviſion to the wife in liferent, and the children of the marriage in fee: Hence it was obvious, that it was granted in contemplation of marriage.

The deed now in queſtion bears to be granted for love and favour; it makes no proviſion for children, and appears to be a teſtamentary donation from two circumſtances: 1*ſt*, That it is burdened with debts, and reſerves the diſponer's liferent. 2*dly*, That it was not delivered to the diſponee. The irritancy therefore has no place; for a teſtamentary bequeſt by a wife to her huſband was ſuſtained, though the marriage diſſolved within the year. Haddington, 6th February 1606, Ld. Covington *contra* Veitch.

'The Lords ſuſtained the defence, and aſſoilzied.'

G. F.

Act. *Macqueen, John Douglas.* Alt. *G. Buchan-Hepburn, Geo. Ferguſſon.*

No. XLIV. *November* 20. 1766.

MARGARET MATHIESON;

Againſt

JOHN MATHIESON.

PROVISION TO HEIRS AND CHILDREN. ——PRESUMPTION.

Eldeſt or *only Daughter.—Proviſion to Children imputes in former Proviſions, though not purified at its Date.*

JOHN MATHIESON elder, being poſſeſſed of an eſtate limited to heirs-male, became bound by his marriage-contract to pay 'to the 'eldeſt or only daughter to be procreated of the marriage,' the ſum of 6000 merks, in the event that there ſhould be no heir-male of the marriage; or, if ſuch heir-male ſhould exiſt and ſucceed to the eſtate, the ſum of 4000 merks.

In either event, he became bound 'to maintain and educate the *eldeſt* 'or *only* daughter to be procreated of the ſaid marriage, conform to her 'degree and quality, till ſhe be married.'

Four daughters exiſted of the marriage, but no male iſſue. During its ſubſiſtence, Margaret, the eldeſt daughter, was married; and John Mathieſon became bound to pay her 3000 merks, without any reference to the obligation to his own contract of marriage.

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The eſtate having devolved on John Mathieſon's ſon by a ſecond marriage, an action was brought by Margaret for the 6000 merks provided to the eldeſt or only daughter of the firſt.

Pleaded for the defender: 1*mo*, *Eldeſt* or *only* daughter muſt be underſtood conjunctively; and, therefore, the purſuer is not intitled to the proviſion as *eldeſt* daughter, ſince ſhe is not *only* daughter alſo. The father was bound to aliment all his daughters equally; and yet the ſame expreſſion is uſed in the clauſe of aliment, as in the clauſe reſpecting the 6000 merks.

2*do*, The 3000 merks already paid, muſt impute *pro tanto* in the 6000 merks, if the proviſion ſhall be found to take place.

Anſwered for the purſuer: The obvious meaning of the terms, *eldeſt or only daughter*, is, that the whole 6000 merks ſhould be due to her, whether there ſhould be more than one daughter or not. And ſo the father underſtood the clauſe reſpecting the daughter's aliment; for, though he maintained his eldeſt daughter in a ſuitable manner till her marriage, he diſmiſſed the reſt without any proviſions.

To the 2*d*: The preſumption *debitor non praeſumitur donare*, does not apply. The purſuer was not creditor in the 6000 merks, at the time the 3000 merks was provided. Her father's firſt marriage ſtill ſubſiſted. Still there might have been heirs-male of the marriage; and, in that event, the 6000 merks was not due.

'The Lords found, that the purſuer was a creditor for the 6000 'merks; but that the after proviſion of 3000 merks muſt impute 'in payment thereof.'

G. F.

Act. *Croſbie*. Alt. *Coſmo Gordon*. Reporter, *Kennet*.

No. XLV. *November* 21. 1766.

Mrs ANNE NIELSON, *&c.*;

Againſt

AUSTINS.

BANKRUPT.

Alimentary Proviſion to a Wife, how far good againſt Creditors?— Claim for Mournings not good againſt Creditors.

MR William Sloan probationer, having made a clandeſtine marriage with Anne Neilſon, in 1752; and, being deſirous of concealing it, leſt it ſhould mar his proſpect of church-preferment, gave her brother

brother an obligation to pay what ſums he ſhould lay out for her, 'as to 'clothes, or tabling, or otherwiſe;' and acknowledged the marriage by a ſeparate miſſive.

In 1754, having been ſettled miniſter at Dunſcore, he again acknowledged the marriage, in another letter; but begged that it might be kept private for ſome time longer, in the idea that, after five years, the cenſures of the church would be preſcribed. In this letter, he renewed his promiſes of maintaining his wife, as he had hitherto done, and propoſed that ſhe ſhould continue to live with her mother.

About the ſame time, Mr Sloan granted a bond for an annuity of L. 5 to his wife, till the 1ſt March 1757, and of L. 30, from that period, till he ſhould publicly acknowledge her; and for a ſmaller annuity in the event of his death.

Mr Sloan lived eleven years after the date of the bond; but ſtill the parties did not cohabit, and the marriage continued ſecret as before.

Mr Sloan having died in 1765, and the marriage having been proved before the commiſſaries, an action was brought by Anne Nielſon, and her relations, who had alimented her, concluding, 1*mo*, For L. 215, ſaid to have been expended on her aliment from 1752 to 1757. 2*do*, For L. 30 yearly, from that period, till Mr Sloan's death, and for the ſtipulated annuity in time coming. 3*tio*, For L. 20 for mournings.

The free effects not being equal to theſe claims, a competition enſued with the creditors.

The purſuers *contended*, That the proviſions muſt be conſidered in the ſame light, as if they had been contained in a contract of marriage, in which caſe, they would have been effectual againſt creditors: That the aliment being a civil, as well as a natural debt upon the huſband, the claim of thoſe who furniſhed it muſt be effectual, in terms of Mr Sloan's miſſive: That the charge for mournings was moderate.

Anſwered for the creditors: The preſent caſe is different from that of a marriage-contract. The marriage having been concealed till the laſt, creditors advanced their money to Mr Sloan in the belief that he was a ſingle man; ſo that Mrs Nielſon is barred *perſonali exceptione* from excluding them, in conſequence of proviſions kept latent by her own fault.

All claims preceding the date of the bond muſt be preſumed to have been diſcharged. At any rate, the obligation upon a huſband to aliment his wife, is only preſtable out of his free funds; and, therefore, cannot compete with creditors. The annuity of L. 30 was exorbitant. The claim of mournings is not good againſt creditors.

'The Lords aſſoilzied from all the claims preceding 1ſt March 1757:
'Found, that the purſuer cannot compete with her huſband's one-
'rous creditors upon the alimentary bond for L. 30 yearly, from
'1ſt March 1757 to the time of her huſband's death; and, there-
'fore, reſtricted the ſame to L. 10 Sterling yearly during that pe-
'riod: Found that ſhe is preferable to her huſband's neareſt of
'kin for the remaining L. 20 Sterling: Found that the purſuer is
'not intitled to mournings.'

G. F.

Act. *Crosbie, Alexander Murray.* Alt. *Macqueen.*

No. XLVI. *November* 26. 1766.

ALEXANDER GRANT;

Againſt

Capt. SUTHERLAND.

JURISDICTION.

Juriſdiction of Courts martial.

UPON a complaint that Lieutenant Forbes of the Earl of Sutherland's regiment, had charged Captain Gordon with L. 6 : 9 : 4, as diſburſed to recruits; but which appearing not to have been paid, was again paid to the recruits themſelves by Captain Gordon; a regimental court-martial gave it as their opinion, that Lieutenant Forbes was due that ſum to Captain Gordon, and that the commanding officer ſhould be pleaſed to order it to be paid.

The Lieutenant-colonel, as the commanding officer of the regiment for the time, iſſued a warrant to Captain Sutherland, the paymaſter, to pay the ſum to Captain Gordon, and ſtate it to accompt of Lieutenant Forbes's ſubſiſtence-money.

Lieutenant Forbes brought an action for payment of his ſubſiſtence-money, in which the queſtion was, how far the above ſentence and warrant were effectual in law.

Pleaded for the defender: The acts for preventing mutiny and deſertion provide, 'That, if any paymaſter wilfully detain or with-hold, 'by the ſpace of one month, the pay of any officer or ſoldier, then, up-'on proof thereof, before a court-martial,' he ſhall be diſcharged, and forfeit L. 100 Sterling. They likewiſe provide, 'That, if any infe-'rior officer or ſoldier ſhall think himſelf wronged by his captain or o-'ther officer commanding the troop or company to which he belongs, 'he is to complain thereof to the commanding officer of the regiment, 'who is hereby ordered to ſummon a regimental court-martial for do-'ing juſtice to the complainant.'

By theſe and other clauſes of the mutiny-acts, a much greater power is given to courts-martial, in matters reſpecting the pay of officers, than what was here aſſumed. And, in practice, matters of this kind have uſually been adjuſted in that manner.

Anſwered: The powers of courts-martial, unknown to the common law, and introduced by the mutiny-acts, for the preſervation of military diſcipline, can never be carried farther than thoſe acts have gone. But there is no clauſe in any of them, which beſtows a juriſdiction in matters

matters of property or civil right. Courts-martial are, indeed, empowered to inflict a very ſevere penalty on a paymaſter guilty of withholding the pay of officers or ſoldiers; yet, even from that clauſe, it is clear, that, though the court-martial can puniſh, it has no power to determine any claim of retention, as was attempted in this caſe; and that all ſuch matters muſt be left to the courts of law.

But, allowing ſuch a juriſdiction to be competent to courts-martial, their proceedings are ſubject to the review of the court of ſeſſion. Military perſons are amenable to the ordinary courts of law; ſo that, at common law, the proceedings of courts-martial might have been judged of by every inferior court; but, by a clauſe in the mutiny acts, all actions, for any thing done in conſequence thereof, or in reſpect of any ſentence of a court-martial, are limited to the courts of record at Weſtminſter, or Dublin, and the court of ſeſſion in Scotland.

Having thus eſtabliſhed the juriſdiction, the purſuer pointed out ſundry irregularities in the procedure, which it is unneceſſary to mention here; and even produced a letter from Captain Gordon, denying that he had ever directed the complaint, or applied for a court-martial.

Hence the judgment of the court can hardly be conſidered as determining, whether courts-martial have any juriſdiction, ſuch as was exerciſed in this caſe; but it fixes the point, that their ſentences may be reviewed.

'The Lords repelled the defence, and found the defender liable in 'expences.'

G. F.

Act. *Crosbie.* Alt. *Rae.*

No. XLVII. *December* 2. 1766.

WILLIAM MACKECHNIE;

Againſt

JAMES WALLACE.

FOREIGN.

Action for Uſury, if limited by the Act 31. *Elizabeth?*

AN action for uſury, upon the act 12. Ann. ch. 15. was brought before a ſheriff, in name of the private party and procurator-fiſcal, concluding for triple the ſum for which the uſury had been exacted, in terms

terms of the ſtatute; one half to the private party, the other to the procurator-fiſcal.

In an advocation, *pleaded* for the defender, The action is preſcribed by the ſtatute 31. Elizabeth, ch. 5. which enacts, 'That all actions 'brought upon any penal ſtatute, made or to be made, muſt be ſued 'within two years after committing the offence, when the penalty is 'appropriated to the crown; and, where the penalty goes to the crown 'or other proſecutor, the proſecutor muſt ſue within one year, and the 'crown within two years after that year ended.'

The laſt act of uſury libelled on, in this caſe, was more than a year prior to the citation, ſo that the action is preſcribed as to the private party. And, as to the intereſt of the crown, it would ſeem that the ſtatute of Queen Anne gives the crown no ſhare of the penalties, except in the caſe of uſury committed by ſcriveners, and others particularly mentioned, and diſtinguiſhed from common uſurers.

But, ſuppoſing the crown to have had an intereſt, no proper action was brought for making it effectual. Procurators-fiſcal hold their commiſſions from inferior judges, and are not authoriſed to ſue for penalties in behalf of the crown. His Majeſty's advocate has brought no action; and, therefore, the claim is preſcribed.

It never could be the intention of the legiſlature, that a penal action, limited to three years in England, ſhould ſubſiſt forty years in Scotland; and, accordingly, it is laid down by Erſkine, IV. 4. 66.; and Bankton, II. 12. 22. p. 188. that the act 31. of Elizabeth limits the endurance of ſuch penal ſtatutes as extend to Scotland. And ſo it was decided in the laſt caſe that occurred, 13th January 1747, Bookſellers of London *contra* Bookſellers of Edinburgh.

Anſwered: It has been matter of diſpute, whether acts of the Britiſh parliament extend to Scotland, without expreſs words to that purpoſe; as in the caſe, 18th December 1753, Duke of Douglas *contra* Lockhart. But, as it would be adverſe to the general principles of law, ſo it would be contrary to the 18th article of the treaty of Union, to hold that a ſtatute of the Engliſh parliament, in the year 1589, can have any legal effect in Scotland.

Accordingly, in an action for the triple value of money loſt at play, upon the 9th of Queen Anne, the defence founded upon the ſtatute of Queen Elizabeth was repelled; 19th January 1737, Murray *contra* Cowan, *Dict. Foreign.*

The deciſion, in the caſe of the bookſellers, ſeems to have proceeded upon different principles. The ſtatute 12. G. II. ch. 36. was intended for the encouragement of the manufacture of paper; and the ſame article of the Union, which prohibits any alteration of the private law of Scotland, declares, that the laws for the regulation of trade, cuſtoms, and exciſe, ſhall be the ſame in Scotland as in England.

Beſides, though the act of Queen Elizabeth were admitted to limit penal actions for what may be denominated *new delicts*, or things, for the firſt time, declared criminal by a new ſtatute, that would not apply to uſury; a crime known in the law of Scotland long before the Union; and which muſt, therefore, be tried according to the eſtabliſhed forms of that law.

'The

'The Lords repelled the defence founded upon the act of the 31ſt of 'Queen Elizabeth.'

G. F.

Act. *David Dalrymple.* Alt. *Lockhart, Maclaurin.*
Reporter, *Juſtice-clerk.* Clerk, *Pringle*

No. XLVIII. *December* 2. 1766.

STEWART;

Againſt

FOGGO.

LEGAL DILIGENCE, COMPENSATION, RETENTION.

A Bill having been indorſed to a merchant in London, for *value in account*, was proteſted in his name for not payment, and returned to the indorſer, who charged the accepter with horning, and executed a poinding, after receiving advice that the indorſee had died at London ſome days before the date of charge.

'The Lords reduced the poinding;' though it was pleaded that, in the caſe of indorſations for value in account, the ſubſtantial intereſt remains in the indorſer.

And they repelled the plea of retention argued for the poinder, upon the authority of the deciſions, 10th December 1707, Lees *contra* Dinwoody; and 14th July 1745, creditors of Glendinning *contra* Montgomery.

In both theſe caſes, there was a *bona fides*, which did not occur in this caſe.

G. F.

Act. *Sinclair.* Alt. *Armſtrong.*

No. XLIX. *December* 9. 1766.

MORE;

Againſt

PAXTON.

PROMISSORY NOTE.

Arreſtment, if preferable to the Indorſation of a promiſſory Note?

AN arreſtment of the ſum in a promiſſory note, laid in the hands of the debtor in the note, and proceeding upon the debt of the original creditor, was found preferable to an indorſation blank in the date, there being no ſufficient evidence that the indorſation was prior to the arreſtment.

It is unneceſſary to reſume the debate, whether promiſſory notes fall under the act of parliament concerning blank writs; if they were tranſmiſſible by indorſation; and, in general, if they were intitled to the other privileges of bills of exchange, which are now extended to them by the act 12th George III. ch. 72.

G. F.

For the indorſer, *Maclaurin.* Alt. *H. Dundas.*

No. L. *December* 17. 1766.

DRUMMOND, and others;

Againſt

HUNTER.

PROOF.

Proved or not proved, that a Diſpoſition of Heritage was granted.

JOHN DRUMMOND, having ſeven children, and being poſſeſſed of a conſiderable moveable eſtate, with two houſes in Edinburgh, executed a truſt-deed in 1706, upon this narrative: 'Foraſmuch as I have de-

'clared

'clared my opinion, and made ſettlement and diviſion of my eſtate a-'mong my wife and children by a paper apart, of the date hereof, 'which houſes,' after an enumeration of the particulars of his eſtate, 'annualrents, bonds, obligations, heritable and moveable 'ſubjects, or others which ſhall belong to me the time of my 'deceaſe, are to be divided in eight parts or ſhares among my children, 'two parts to my eldeſt ſon, and the remaining ſix parts among my o-'ther children.'

A regular book of accounts had been kept by the truſtee, to whom the ſubjects were aſſigned for behoof of the children; and, to this book, there was a docquet annexed, which was ſigned by all the children, and bore that John Drummond deceaſed, 'in the ſettlement of his affairs, 'did make diviſion of his fortune, real and moveable, into eight ſhares, '&c.'

In 1713, John Drummond, the eldeſt ſon, executed a diſcharge and renunciation 'of all he could aſk or claim, by virtue of any bond of 'proviſion, or other writ conceived in his favour, or by any other right 'or title competent to him.'

At the diſtance of 60 years, William Hunter, the grandſon of John Drummond the eldeſt ſon, ſerved heir to his great grandfather in the two houſes, which had been made over by the younger ſons to their ſiſters; and they, having no feudal title in their perſons, brought an action againſt William, concluding that he ſhould be decerned to make up titles and convey in their favour.

As the deed referred to in the ſettlement was not produced, a great deal of argument was uſed, and many deciſions quoted on both ſides, upon the queſtion, how far the ſettlement could be effectual to carry heritage. Moſt of theſe are to be found, *Dict. v. Teſtament*, p. 459. Some more recent deciſions were alſo appealed to, particularly, 18th January 1764, Burgeſs *contra* Stantin.

But it is unneceſſary to recapitulate the arguments more fully, the court having taken up the caſe upon a different medium, and pronounced the following interlocutor:

'The Lords, having conſidered the narrative of the deed executed by 'John Drummond elder, with the docquet ſubjoined to the fitted 'accompt, ſigned by John Drummond younger, and whole other 'circumſtances of this caſe, find ſufficient evidence that John 'Drummond elder did make a ſettlement of the ſame date, by 'which he divided his whole heritable and moveable eſtate into 'eight ſhares, whereof two parts were given to John Drummond 'his eldeſt ſon, and the remaining ſix parts to his other children; 'and therefore, and in reſpect of the diſcharge and renunciation 'executed by John Drummond younger, repel the defences, and 'find that he muſt convey the houſes libelled to the purſuers.'

G. F.

Act. *Rae.* Alt. *Montgomery, Maclaurin.*

No. LI.

No. LI. *December* 29. 1766.

DONALDSON;

Againſt

PAUL and others.

SOCIETY.

Joint Adventure.

JAMES PAUL merchant, and John Buchanan and John Barclay hatters in Glaſgow, were concerned in two joint adventures to the Weſt-Indies, with John Macnair weaver, under the firm of John Barclay and company.

Each party was to furniſh his proportion in goods, or money; and the profit or loſs upon the whole was to be communicated.

An action was brought by Robert Donaldſon for the price of goods ſold to John Macnair, and entered in his books *to John Macnair and company*, which goods, he alledged, had been ſent to the Weſt-Indies along with the other goods belonging to the defenders, who, being engaged in a copartnery or joint trade, muſt be bound by the deed of any one partner.

Anſwered: From the manner in which the goods were furniſhed by the different perſons concerned, the defenders have no acceſs to know, whether thoſe put into the common ſtock by Macnair were bought from the purſuers or not. Nor is it material.

Perſons united in a proper copartnery are liable *ſinguli in ſolidum*, and bound by the actings of the different partners. With reſpect to the trade in which they are engaged, they act as one perſon, ſubſcribe by one name, and tranſact buſineſs in one houſe, from which, and other circumſtances, the public are induced to deal with each partner on the credit of the whole. But, in a joint adventure, the union is leſs intimate; and as third parties cannot be induced to deal with one of the adventurers on the faith of a tranſient connection, which they can ſcarcely have acceſs to know; ſo there is not the ſame reaſon to conſider the bargains made by one of them as binding upon the reſt.

Accordingly, this is underſtood to be law in all commercial countries, and the diſtinction is accurately laid down in a work called *Le Parfait Negotiant*, by Savary, Liv. I. ch. 1. It is mentioned by Erſkine, III. 3. 10. though overlooked by the other writers upon the law of Scotland; and appears to have been adopted by the court in the caſe of Champion *contra* Falls and Murray, in 1731.

'The Lords found, that it is not denied that the firm of the defen-
'ders company was *John Barclay and company*, and the goods are
'ſtated in the purſuer's books to the debit of *John Macnair and*
'*company*; and that, though it appears the goods were ſent a-
'broad with the company's goods, it is not proved that the com-
'pany commiſſioned them; and, therefore, aſſoilzied the defen-
'ders.'

G. F.

Act. *Wight.* Alt. *Maclaurin.*

No. LII. *January* 22. 1767.

MACPHERSON;

Againſt

ARROT.

BONA ET MALA FIDES,

Command of a Superior.

JOHN ARROT, by order of John Murray of Broughton, ſecretary to the Pretender, drew precepts on the tenants of the eſtate of Winton for their farm victual. Theſe precepts were accepted by the tenants, and indorſed by Arrot; againſt whom an action was brought, after the precepts had been proteſted againſt the tenants, for not delivery, and againſt the drawer for recourſe.

The purſuer *contended*, That theſe precepts muſt be conſidered in the ſame light as bills of exchange, ſo as to ſubject the drawer and indorſer in recourſe.

The defender, on the other hand, *pleaded*, That the precepts were null, as wanting the ſolemnities of probative writings. And, ſuppoſing them actionable, that the indorſations could be conſidered in no other light than that of an aſſignation, which implies warrandice from fact and deed only; and which warrandice is not incurred in the preſent caſe, ſince the refuſal of the tenants to deliver the victual was not occaſioned by the fault of the defender, but was a neceſſary conſequence of the ſuppreſſion of the rebellion; ſo that the principles will apply, which were eſtabliſhed in the action brought by the town of Paiſley, againſt Mr Murray, for reſtitution of the money levied by the rebels.

'The Lords, in reſpect the precepts were drawn by the defender, as 'factor appointed by the rebels upon the eſtate of Winton, and 'purchaſed by the purſuer's author, when in the knowledge of the 'character in which he acted, and that the value paid was applied 'for behoof of the rebel army, which was then in poſſeſſion of that 'part of the country, found that the defender is not liable in re-'courſe.'

G. F.

Act. *Jo. Williamſon.* Alt. *Montgomery.*

No. LIII. *February* 24. 1767.

MACHARGS;

Againſt

CAMPBELL.

REPARATION.—RES INTER ALIOS.

Aſſythment.—Sentence of a Court-martial, evidence in an Action of Aſſythment.

COLIN CAMPBELL of Kilberry, Major-commandant of the 100dth regiment of foot, incamped before Fort-Royal in the iſland of Martinico, being accuſed of the murder of John Macharg, a Captain in the ſame regiment, was tried upon the ſpot by a court-martial, who pronounced this ſentence:

'The court is of opinion, that Major-commandant Colin Campbell is 'guilty of the crime laid to his charge; but there not being a ſufficient 'majority of voices to puniſh with death, as required by the articles of 'war, the court doth adjudge the ſaid Major-commandant Colin Camp-'bell to be caſhiered for the ſame. And it is the farther opinion of the 'court, That he is incapable to ſerve his Majeſty in any military em-'ployment whatſoever.'

The proceedings of the court-martial were approved by the King; and Colonel Campbell was caſhiered accordingly.

James Macharg of Keirs, father to the deceaſed, and Quintin and Iſabel Machargs, his brother and ſiſter, brought an action of aſſythment in the court of ſeſſion.

Pleaded in defence: 1*mo*, Aſſythment, in the caſe of ſlaughter, appears to have been a refinement upon the original practice of the northern nations, when beginning to emerge from a ſtate of barbarity. Private revenge was the only puniſhment of crimes in the firſt ſtage of ſociety.

ſociety. It was an improvement to ſubſtitute in its place a pecuniary reparation, known in all the northern nations under various denominations, taken from the ſpecies in which the ſatisfaction was made. As *cro*, which in Celtic ſignifies kine, *galnes*, calves, *vergelt*, perhaps *airget*, money; *Kelchyn*, *Enach*, &c.

But ſo imperfect a ſyſtem of puniſhment, which in effect gave an immunity to the wealthy, could not ſubſiſt in a maturer ſtate of ſociety. Corporal puniſhments were introduced, as a more effectual method of checking the progreſs of crimes, and the change was ſubmitted to, as affording a more ample gratification of reſentment. *That*, however, might be diſappointed by the pardoning mercy of the Sovereign; and it became neceſſary to ſubſtitute a pecuniary ſatisfaction, to prevent the murmurs of the perſons injured, and to obtain their conſent.

Such is the idea of aſſythment given us by Preſident Balfour, who ſays that it was paid 'to the kin, bairnis, and freindis—in contentatioun of 'their damnage,—and for pacifying of thair rancor.' Pract. p. 516. c. 1.

The ſtyle of letters of Slains, as given by Dallas, is agreeable to this idea. It expreſsly ſtipulates forgiveneſs and oblivion of all rancour, grudge, and reſentment. Lord Bankton tells us, that aſſythment was given to the wife and neareſt of kin, 'that they might be reconciled to 'the manſlayer.' Bankt. I. 10. 15.

Accordingly, it appears from the whole ſtrain of our ſtatutes, that aſſythment did not take place, unleſs where the King had interpoſed by granting a remiſſion. See 1424. c. 46. 1528. c. 7. 1584. c. 136. 1592. c. 157. 1593. c. 173. and 178. By theſe ſtatutes, perſons who take themſelves to remiſſions are obliged to pay an aſſythment. But the act 1528. c. 7. makes an exception of ſlaughter and mutilation, which are declared 'to keip the ordour of the act maid there-'upon of before.' This, Sir George Mackenzie, in his obſervations upon the ſtatute, explains to import, that, 'becauſe by the 63. act of par-'liament 6. James IV. (i. e. 1503. c. 63.) no remiſſion can be granted 'for theſe crimes; therefore, there can be no aſſythment.'

No inſtance can be pointed out where aſſythment was awarded, or even claimed, except where a remiſſion had taken place; and this is ſtrong negative evidence, that it was conſidered as a *ſuccedaneum* to the puniſhment, and not as a civil claim of damages or reparation.

It is upon this principle, that aſſythment is proportioned to the *rank* of the deceaſed, not to his *eſtate*; that the action is limited to the *neareſt in kin*, though others may be equal ſufferers; that it cannot be purſued without the concurrence of *all* the neareſt in kin; that it is not competent when the manſlayer has ſuffered the laſt puniſhment of the law.

In the preſent caſe, the law has had its courſe; the Sovereign has not interpoſed to mitigate it; the defender has ſuffered the puniſhment commenſurated to his guilt.

2*do*, *Et ſeparatim.* The ſentence of the court-martial affords no proof that a murder was committed, ſo as to give room for the demand of an aſſythment.

For, *firſt*, the court of ſeſſion is not at liberty to go upon the evidence led before the court-martial, or to proceed upon the ſentence pronounced by them.

Evidence

Evidencc adduced in one court, for a ſpecial purpoſe, cannot be pleaded in another court for a different purpoſe. A proof of forgery brought in the court of juſticiary *ad vindictam publicam*, would not be evidence in the court of ſeſſion, in an action of improbation of the ſame writings.

The verdict of a jury returned in the court of juſticiary, convicting of theft, was found not to be *probatio probata*, in an after action of damages in the court of ſeſſion; 27th November 1739, creditors of Machar *contra* Bontein. Nay, in the ſame court, evidence adduced *ad hunc effectum*, would not be evidence to another effect. In the court of exchequer, the condemnation of the ſhip and that of the cargo, may turn upon the ſame facts; but evidence led in a trial for condemning the one, would not be ſuſtained in a trial for condemning the other.

2. The ſentence of the court-martial, does not import that the defender was guilty of murder.

It bears, indeed, that the defender was guilty of the crime laid to his charge; but this is obviouſly an inaccuracy, and it is explained by the tenor of the ſentence. If murder had been found proved, the puniſhment of murder muſt have been inflicted. Since then the defender was not condemned to the puniſhment of murder, he cannot have been found guilty of the crime.

In every court, there is a legal number which muſt concur, before a condemnatory ſentence can be pronounced. Suppoſe in Scotland *ſeven* of the jury voted for finding the pannel guilty, or ſuppoſe in England, all but one juryman gave their voices for it, ſtill, whatever preſumptions might ariſe, the pannel would be an innocent man in the eye of the law. Juſt ſo in a court-martial, whatever may be the opinion of a majority of the members, yet, unleſs a legal majority, 9 out of 13, give their concurrence, a capital puniſhment cannot be inflicted, nor a capital crime found proved. And judging of the ſentence by this ſimple rule, it is clear that it affords no proof of murder; though it ſhould be held as probative in this court ſo far as it goes.

Anſwered, to the 1*ſt* defence: In all caſes of damage incurred *dolo aut culpa* of another, the perſon injured is intitled to reparation, every crime producing a two-fold action, one criminal, *ad vindictam publicam*, another civil, *ad damnum et intereſſe*: 'Ex quibus cauſis publica ſunt judicia, ex his cauſis non eſſe nos prohibendos, quo minus et privato agamus,' is the rule laid down by Ulpian, L. 7 §1. *D. de Injur.* And, in the caſe of murder, the action is competent to the relations of the deceaſed, 'In factum actio moribus comparata eſt, quae datur conjugi ſuperſtiti, haeredibus, liberis, et iis quos defunctus alere tenebatur;' Math. tit. *de Sicar.* cap. 7. § 11.

And this action is not confined to the caſe of murder. By a variety of ſtatutes, aſſythment is given in other crimes. See 1424. c. 33. 1425. c. 51. 1426. c. 95. 1457. c. 74. 1528. c. 7. 1584. c. 136. 1593. c. 178. In many of theſe ſtatutes, it is expreſsly provided, that remiſſions ſhall not be granted, without caution found for the aſſythment. And ſo little reaſon is there for ſuppoſing that the claim of aſſythment is limited to the crime of ſlaughter, that it is excepted in the ſtatute 1528. c. 7. At

that

that period, murder was incapable of being pardoned; ſo that it was unneceſſary to make any enactment with reſpect to the aſſythment, in the event of a remiſſion, which could not take place. But this does not imply, that aſſythment could not be exacted where puniſhment had been inflicted. On the contrary, the multitude of ſtatutes providing for payment of the aſſythment, notwithſtanding a remiſſion, clearly points out, that it was in that caſe only, that any doubt was entertained on the ſubject. At common law, the criminal was bound to aſſyth the party whom he had injured; no ſpecial ſtatute was neceſſary to eſtabliſh a point received and underſtood; but a doubt might be entertained, how far crimes were not entirely aboliſhed by a remiſſion, ſo as not only to ſtop the puniſhment of the law, but to exclude the claim of damages. To obviate this doubt, was the intention of thoſe various ſtatutes, which provide that aſſythment ſhall be due, notwithſtanding a remiſſion. The Sovereign, the fountain of juriſdiction, and the repreſentative of the public, may pardon the injury done to the public; but he cannot encroach upon private right, or deprive the party injured of his claim to indemnification.

Accordingly, all our lawyers have conſidered aſſythment in the light, not of puniſhment, but of reparation. In *Quoniam Attachiamenta*, the title of the 69th chapter is, 'Licet curiae in cauſa criminali taxare *dam-*'*num* partis;' and that damages were underſtood to be due in the caſe of crimes, is proved by the contents of the chapter itſelf. The paſſage from Balfour, quoted by the defender, is really an authority to the ſame purpoſe. Lord Stair conſidered aſſythment in that light; Stair, I. 9. 7. Sir George Mackenzie's authority, in his criminal law, is expreſs to the ſame purpoſe; ſee tit. Remiſſion, § 3. And Lord Bankton lays down the like doctrine, I. 10. § 14. 15. 17.

The act 1661. c. 22. is, by itſelf, a demonſtration, that aſſythment was not looked upon in the light of puniſhment. Homicide, in ſelf-defence, or even caſual homicide, is not, properly ſpeaking, criminal; though, therefore, the ſtatute directs, that the manſlayer, in theſe caſes, ſhall be aſſoilzied from death, yet it expreſsly provides for payment of a fine *to the uſe of the defunct's wife and bairns*, i. e. for an aſſythment; not as a *ſuccedaneum* to capital puniſhment, but as a pecuniary reparation in a caſe where no crime can be ſaid to have been committed. Mere fault infers damages; but *dolus* is the eſſence of crimes.

Anſwered, to the 2*d* defence: 1*ſt*, The defender's argument, were it well founded, would put an end to the claim of aſſythment in all capital crimes. Theſe cannot be tried in the court of ſeſſion, and it may be doubted, if a proof could be brought of them in that court, even to the effect of decreeing an aſſythment. Accordingly, in practice, the ſentence of the criminal court, eſtabliſhing the crime, is the ground of the civil procedure, and *probatio probata* of the guilt.

And this is agreeable to the analogy of law. The proof of forgery led before the court of ſeſſion, is *probatio probata* upon a remit to the court of juſticiary. A declarator of marriage in the conſiſtorial court, is *probatio probata* in an action of aliment before the court of ſeſſion. The caſe of Bontein is a ſingle deciſion, and was attended with very particular circumſtances.

The inſtance of foreign decrees can ſcarcely be conſidered as a parallel example. Theſe receive execution only *ex comitate*. And yet, even in a foreign decree, a decree of the court of King's bench, it was found by the houſe of Lords, that the court of ſeſſion were bound to give execution; 7th January 1755, Wilſon *contra* Brunton and Chalmers.

2. The ſentence of the court-martial ſufficiently eſtabliſhes that murder was committed. The crime laid to the defender's charge was murder, and the ſentence finds the crime laid to his charge proved. He eſcaped, indeed, a capital puniſhment, from the peculiar conſtitution of the court, where ſome of the members laid more weight than others upon certain alledged circumſtances of alleviation; but they appear to have been unanimouſly of opinion that he was guilty of murder.

'The Lords found the defender liable to the purſuers in an aſſyth-
'ment, and remitted to the Ordinary to modify it.'

G. F.

Act. *Lockhart.* Alt. *Sollicitor Dundas, Ro. Campbell.*

No. LIV. *March* 5. 1767.

THOROLD, and others, Aſſignees under the Commiſſion of Bankruptcy of Meſſrs THOMSON and TABOR of London, Merchants;

Againſt

Meſſrs FORREST and SINCLAIR, Merchants in Edinburgh, and others.

FOREIGN.

Arreſters preferred to Aſſignees, under a Commiſſion of Bankruptcy.

WALTER THOMSON a native of Scotland, and Samuel Tabor an Engliſhman, merchants in London, committed an act of bankruptcy, upon the 1ſt of November 1758. A commiſſion of bankruptcy was obtained upon the 2d of November, and the commiſſioners veſted the eſtate in aſſignees upon the 21ſt.

Forreſt and Sinclair, and others, merchants in Scotland, were creditors to the bankrupts, partly by accounts for goods furniſhed to them, and partly by bills of exchange originally due to Engliſhmen, but indorſed in their favour before the bankruptcy.

None of theſe creditors appeared before the commiſſioners of bankruptcy, or claimed upon the debts. But, upon the 8th and following days

days of November 1758, they uſed arreſtments for affecting certain debts due to the bankrupts, by perſons reſiding in Scotland.

The arreſters having brought proceſſes of forthcoming, a competition enſued between them and the aſſignees under the commiſſion.

Pleaded, for the aſſignees: The debts due to the bankrupts are *Engliſh* debts. They are the reſult of that intercourſe of trade, which was carried on by their correſpondents here, with the bankrupts reſiding in England. It was *there* that they made the advances by which they became creditors, and it was *there* that the money ought to have been repaid. England, therefore, was both the *locus contractus*, and the *locus ſolutioni deſtinatus*.

It is a point much diſputed among lawyers, whether *moveables* have any *ſitus* other than that of the creditors *domicile*; and it has been ſaid that they follow the perſon of the creditor, and muſt be held to be in that place, *ubi dominus rerum ſuarum larem ſummamque conſtituit*.

But, whatever may be held as to moveables, which are capable of local ſituation, the caſe is clearer as to debts, mere incorporeal rights, incapable of loco-poſition in themſelves, and which can ſcarcely be conſidered as exiſting any where, but in the perſon of the creditor. Indeed, it would produce ſtrange effects, were debts ſuppoſed to follow the perſon of the *debtor*, who, by that means, would have it in his power, not only to conſtitute as many *fora competentia* for his creditors, as the different kingdoms he choſe to reſort to, but even to vary his ſucceſſion in the ſame manner. With regard to the laſt point, the queſtion came to trial, 28th November 1744, Brown *contra* Brown. In that caſe, the law of the *creditor's* domicile was found to regulate the *ſucceſſion* to debts; and there ſeems to be no reaſon why the ſame thing ſhould not take place in queſtions of tranſmiſſion *inter vivos*.

But the preference of the aſſignees may be ſupported, without diſcuſſing theſe abſtract points.

It cannot be diſputed, that the aſſignees are intitled to compete for their intereſt. That is an adjudged point in various inſtances. If ſo, it muſt follow that they are preferable. A *voluntary* aſſignation by the common debtor, would have been good, if executed according to the forms eſtabliſhed *in foro domicilii*. A *neceſſary* aſſignation would alſo have been good, were it the practice in England to make the bankrupt execute a conveyance of his eſtate in conſequence of the commiſſion. And it cannot alter the caſe, that, by the laws of that country, a bankrupt is not required to convey, but only to diſcloſe his effects, which are held to be, *ipſo jure*, veſted in the aſſignees, from the time of the act of bankruptcy. To give full effect to this transference of the property, is not to recogniſe the authority of a foreign ſtatute, as obligatory beyond the territory of the law-giver: It is no more than to ſupport a conveyance, formal according to the laws of the place where it was executed; a thing which has been uniformly done whenever the queſtion occurred.

The laws of a foreign ſtate, cannot operate authoritatively *extra territorium*; but there are certain conſequences ariſing from the laws of one nation, which muſt, in equity and juſtice, be allowed to take effect in another. Marriage is a legal aſſignment to the huſband of the debts due

due to the wife. Suppoſe the debtor ſhould retire into England, where the law is different, it would be no defence to ſay that the debt was now become an Engliſh debt, and muſt be regulated by the law of that country. In England, promiſſory notes carry intereſt; in Scotland, they do not. Suppoſe an action to be brought here, for payment of a promiſſory note granted in England, there cannot be a doubt that decree would be recovered not only for the principal, but alſo for the intereſt.

The ſame rule has been followed, with reſpect to the *extinction* of obligations. In an action purſued upon a bond granted in England, payment was allowed to be proved by witneſſes; 16th February 1626, Galbraith *contra* Cuningham. The oath of the cedent was admitted againſt the aſſignee of a bond granted in England; 28th June 1666, Macmorlan *contra* Melvill. The Engliſh ſtatute of limitations has been allowed to be pleaded in bar of an action purſued here for a debt contracted in England; *Dict. voce, Foreign.*

If then the law *in foro contractus* regulates the conſtitution, and the extinction of obligations, it would ſeem to follow that it muſt regulate their tranſmiſſion alſo. And, accordingly, in the noted competition of the creditors of Captain Wilſon, 1ſt February 1755, the aſſignees were preferred to the arreſters.

It was pleaded *ſeparatim*, That the bankrupts had obtained the Lord Chancellor's certificate, which was an effectual bar to all actions for prior debts, at leaſt againſt Engliſh creditors; and the arreſters muſt be conſidered in that light, as having indorſations in truſt of bills of exchange originally due to Engliſhmen.

Anſwered for the *arreſters:* Although, in a queſtion of ſucceſſion, the right of the debts due to the bankrupts might be regulated by the law of England, yet that is nothing to the preſent caſe, where it is enough to obſerve, that the debts arreſted are due by perſons reſident in Scotland, and cannot be purſued for elſewhere than in the courts of Scotland, or attached otherwiſe than by the diligence of the law of Scotland.

Nor is there any abſurdity in ſuppoſing a creditor, who has lands, or moveables, or debts, in different parts of the world, to be amenable to as many different juriſdictions; On the contrary, there is a neceſſity, that his creditors ſhould have acceſs to affect his ſubjects.

It cannot be maintained that an Engliſh ſtatute can have effect in this country *vi ſtatuti*; the utmoſt length that it is poſſible to go, is, that it ought to be inforced by that *comitas* which prevails among different countries. But all *comitas* muſt be mutual; and it is certain, that the judges of England would pay no regard to a mere poſitive enactment of the law of Scotland. There can be no reaſon, therefore, to give effect here to ſimilar enactments of the Engliſh law.

The legal transference of the eſtate of the bankrupt, which takes place in England, in conſequence of the commiſſion, muſt be conſidered in a very different light from a voluntary conveyance. The creditor has a right to diſpoſe of his property as he pleaſes, and a conveyance made by him muſt be effectual every where. But a legal conveyance is ſtrictly local, and can never operate beyond the territory of the legiſlature which introduced it. Payment may have been allowed to be proved, in a manner

agreeab[le]

agreeable to the law of the country where the debt was contracted, from the juſt preſumption, that the party relied on that ſpecies of proof which is there admitted. For a ſimilar reaſon, the Engliſh ſtatute of limitations may, in ſome caſes, have been held to be the rule in the extinction of obligations contracted in England. Conveyances may have been ſuſtained when executed according to the forms of the law of that country where they were made, though different from the forms known in this country: And, upon this principle it is, that, in the preſent caſe, the aſſignees have been found intitled to compete, though deriving their right from a ſpecies of legal conveyance unknown in Scotland. But it does not follow from thence, that the diligence of the law is to be diſappointed, in conſequence of a ſtatutory transference of property eſtabliſhed by the law of another country. To admit this effect, would be to render our own legiſlature, and our own judges, ſubordinate to foreign laws and foreign courts.

Anſwered to the argument upon the Lord Chancellor's certificate: It would ſeem that the benefit of the certificate is not meant to reach beyond England itſelf, for which, reference was made to the opinion of Lord Talbot and of another great lawyer, which are given by Davies *on Bankrupts*. Indeed, the plea now urged could not be maintained even in England. *There* no creditor is compelled to accede to the commiſſion; and creditors, who have not acceded to it, are not barred by the certificate, as was proved by ſeveral authorities from the law of England, particularly 7. Viner, p. 116. 134.

Hence it follows, that the certificate could have no effect againſt the arreſters, though it were allowed, in any caſe, to afford a defence in the courts of Scotland. At any rate, the benefit given by the certificate, is a privilege perſonal to the bankrupt, and which cannot be pleaded by his creditors or any other perſon. See 2. Vern. 696. 697.; Trin. 1715. Goodwin's caſe.; 2. Viner, 131.

'The Lords found, that the proceedings, under the commiſſion of 'bankruptcy, did not bar the creditors of the bankrupts, whether 'their debts were contracted in England or Scotland, from affecting 'their debtors effects ſituated in Scotland, or debts due to 'them by perſons reſiding in Scotland, by legal diligence: And 'therefore found, that ſuch of the arreſters, againſt whoſe arreſt-'ments no objections are made, are preferable to the aſſignees un-'der the commiſſion of bankruptcy.'

G. F.

For the aſſignees, *Lockhart*.
For the arreſters, *Ferguſon*, *Montgomery*, *John Campbell, jun.* *Pat. Home*.
Reporter, *Edgefield*. Clerk.

No. LV. *June* 13. 1767.

BLACKLOCK;

Againſt

HERON and others, Tutors of ALEXANDER GOLDIE.

SALE.

Where the Buyer's faith is followed.

ROBERT BLACKLOCK purchaſed the lands of Over Clifton from Alexander Kincaid, and paid a part of the price; but, refuſing to pay up the balance, upon account of incumbrances not purged, was charged for payment, and obtained a ſuſpenſion.

During the dependence of the proceſs, Blacklock diſponed the lands to Mr Goldie his agent, upon the narrative of a certain ſum of money paid, and under a declaration that he ſhould, by his acceptance of the diſpoſition, become bound to relieve him of the price. At the ſame time, Mr Goldie granted bond for the part of the price already paid by Blacklock, obliging himſelf to relieve him of the balance; and this bond, notwithſtanding the narrative of the diſpoſition, is declared to be the value given for it.

Some time after, Mr Goldie was cognoſced lunatic; and a ranking and ſale of his eſtate having been raiſed, Blacklock, who was puſhed by Kincaid for the balance of the price, brought an action againſt Mr Goldie's tutors dative, concluding, that the conditions of the bond and diſpoſition ſhould be implemented, or that the lands ſhould be reſtored.

Argued for the purſuer: Though a *bona fide* purchaſer from Mr Goldie would not have been liable to this ground of challenge, the preſent caſe is different where Mr Goldie himſelf is the party, and where the queſtion is, Whether he can hold the ſubject without implementing his part of the tranſaction? The negative is implied in all mutual contracts. Where one party fails to implement, the other may either inſiſt for damages, or bring a declarator to have the contract annulled; 13th July 1670, Raith *contra* Woolmet; 20th July 1675, Maitland *contra* Ld. Gight.

In the caſe of excambion, if the one parcel of lands be evicted, the party ſuffering the eviction has regreſs to his own original lands; and the ſame principles apply to a contract of ſale. Indeed, it has been found, that, where the diſponer becomes inſolvent, proceſs lies for ſtopping his infeftment, and drawing back the diſpoſition; Home, December 1721, Selkrig *contra* Selkrig.

Anſwered:

Anſwered: Where the ſale remains *in nudis finibus contractus*, there is no more than a perſonal obligation; and neither party can demand implement, unleſs he be ready and able to give it. But here the tranſaction did not remain upon the footing of a minute of ſale. The lands were delivered on the one hand, and the price ſecured on the other: And this is equivalent to payment; 'ſi is qui vendidit fidem emptoris 'ſequutus fuerit, dicendum eſt, ſtatim rem emptoris fieri,' § 41. Inſt. de *R. D.* Indeed, the *pactum legis commiſſariae* was introduced for the very purpoſe of preventing the immediate transference of property upon delivery; and, ſince no ſuch paction intervened in the preſent caſe, the ſeller muſt be underſtood to have betaken himſelf to the perſonal ſecurity of the purchaſer.

Excambion ſtands upon different principles from ſale. Each party is *debitor ſpeciei*, and the contract is not completed without an effectual transference upon both ſides, which cannot take place, if one of the parties was not the real proprietor of the *ſpecies* which he took upon him to convey. But, in ſales, the ſeller only is *debitor ſpeciei*, and the purchaſer is *debitor nominis*; there is no *ipſum corpus* to be delivered by him; and, therefore, his obligation may be ſatisfied by equivalents, by giving ſecurity, as well as by actual payment.

'The Lords repelled the reaſons of reduction, and aſſoilzied.'

G. F.

Act. *Macqueen.* Alt. *Crosbie.*

No. LVI. *July* 16. 1767.

MITCHELL;

Againſt

ADAM.

SEISINE.

Inſeſtment in a Right of Annualrent *taken on a Precept in a Diſpoſition of the* Property.

AN infeftment, in a right of annualrent granted by a perſon not infeft, proceeding upon the precept contained in a diſpoſition of the property in favour of the granter of the annualrent, was found inept.

It was *pleaded:* That precepts may be aſſigned in whole or in part, and that *majori ineſt minus.* But the anſwer was plain. Though there

was

was a warrant for infeftment in the property, and which might have been executed as to a part of the ſubject, there was no warrant for an infeftment in a right of annualrent.

G. F.

Act. *John Douglas.* Alt. *James Grant.*

No. LVII. *July* 17. 1766.

GILLENDERS;

Againſt

BIRWHISTLE.

PROMISSORY NOTE.

Recourſe ſuſtained, though not duly negotiated.

PROMISSORY notes payable, 30th June, were indorſed 25th June, to a gentleman in the iſland of Lewes, with recourſe, in terms of a fitted accompt of the ſame date.

The notes were tranſmitted by the indorſee to his agent at Edinburgh, in a letter of 26th June, and came to hand upon the 6th of July, but were not proteſted till the 13th. The debtor in the notes became bankrupt on the 23d of July.

The Lords found recourſe competent, though, in the caſe of a bill of exchange, it would have been cut off by failure of negotiation. But it ſeems to have been the opinion of the court, that promiſſory notes did not require exact negotiation.

G. F.

Act. *Lockhart, Sollicitor Dundas.* Alt. *Macqueen.*

No. LVIII.

No. LVIII. *July* 17. 1767.

JOHN TAYLOR;

Againſt

The Convenery of the TRADES of Aberdeen.

Powers of Incorporations in naming their Clerks.

THE deacons of the ſeveral trades, the conveener and treaſurer, with as many more, elected from the ſeveral incorporations, as, in all, amount to the number of 33, compoſe what is called the conveener-court of Aberdeen, which is entruſted with the ſole management of the funds belonging to the trades in general; and the clerk choſen by the convenery court is *virtute officii* clerk to the ſeveral incorporations.

In 1724, upon the death of a former clerk, the convenery elected Mr John Taylor to be their clerk, 'during all the days of his life-time, and 'his good ſervice in the ſaid office.'

In 1756, Mr Taylor applied to have his ſon James conjoined with him in the office, and named to the ſurvivancy of it, which was done by an act of the convenery, proceeding on a narrative of Mr John Taylor's valetudinary ſtate of health, and his deſire to have his ſon joined with him.

James Taylor continued to act as joint-clerk, till December 1765, when he died; and Mr James Watſon was propoſed as aſſiſtant-clerk. Mr Taylor oppoſed Mr Watſon's being named; but the convenery, 16th January 1766, upon a narrative of Mr Taylor's valetudinary ſtate of health, nominated Mr Watſon 'an aſſiſtant-clerk, during Mr Tay-'lor's life, and continuance in office; and under this expreſs declaration, 'that, in caſe the ſaid John Taylor ſhall be able and willing to diſcharge 'the duty of the office himſelf, this preſent election ſhall in nowiſe 'prejudge him of any of the profits or privileges thereto belonging, and 'the ſaid James Watſon being only to receive ſuch gratification out of 'the perquiſites of the office, while the ſaid John Taylor lives and con-'tinues in the office, as the convenery ſhall judge adequate to his labour.'

Mr Watſon accepted of the office under theſe conditions; but repreſented that, as his profits, during Mr Taylor's life, would be very ſmall, he hoped the convenery would give him the ſurvivancy of the office for life, after Mr Taylor's death, or reſignation; and the convenery, at ſame ſederunt, elected Mr Watſon 'to be clerk to the convenery and trades 'of Aberdeen, during his life-time, and good ſervice in ſaid office, and 'gave and granted to him the haill ſalary, benefit, and caſualities, for-'merly paid to any clerk in ſaid office, from and after the death of ſaid 'John Taylor, or his demiſſion of ſaid office.'

Of the members of the convenery, there were for electing Mr Watſon aſſiſtant-clerk 24, againſt it 3; two members were abſent, and four did not vote. And, in the after-ſtep of electing him to the ſurvivancy, there were for it 23; againſt it, one. Four declined voting, and five were abſent.

Upon the 12th March 1766, Mr Watſon appeared in the convenery court, and declared, that he was willing to act as clerk, when Mr Taylor could not attend, and that without demanding any part of Mr Taylor's ſalary; and this offer was recorded in the convenery books.

Mr Taylor and his adherents brought a proceſs of reduction for ſetting aſide Mr Watſon's election, in which Lord Auchinleck, as Ordinary, by interlocutor, 29th November 1766, 'In reſpect James Watſon has 'declared, by an act, recorded in the convenery-court books of Aberdeen, 'that he is to demand no part of the ſalary or perquiſites of the office, 'during Mr Taylor's life, found Mr Taylor is not hurt by Mr Watſon 'being appointed his aſſiſtant; therefore aſſoilzies the defenders from 'the action, ſo far as it concludes, that the act of election appointing 'Mr Watſon aſſiſtant-clerk to Mr Taylor, during his life, ſhould be re-'duced, and decerns; and appointed both parties to give in memorials 'on the point, how far the convenery court are intitled to name Mr 'Watſon clerk to the trades, after Mr Taylor's death; or, if they can 'appoint a clerk, but in the caſe of the actual vacancy of the office.'

Mr Taylor gave in a repreſentation againſt that part of the interlocutor, which ſuſtained Mr Watſon's election as aſſiſtant-clerk, to which anſwers was made, and memorials given in on the point not determined; and the Lord Ordinary, 'Having conſidered the repreſentation for the 'purſuers, and anſwers, with the mutual memorials, upon the point not 'determined by the interlocutor, and ſpecially, that it is admitted to have 'been the cuſtom for above 40 years, for the convenery court to have 'perſons fixed for ſucceeding the clerk in poſſeſſion, in the event of his 'death, which may be attended with convenience, as it is an office of 'truſt, and proper to be diſcharged by a perſon who has been called u-'pon particularly to make himſelf acquainted with the duties of it, ſuſ-'tains the defences, and aſſoilzies.' And to this interlocutor his Lordſhip adhered.

A reclaiming petition was preſented to the court for Mr Taylor; upon adviſing of which, with anſwers, the Lords, 17th July 1767, 'found 'the convenery court had no power to conjoin an aſſiſtant with John 'Taylor, in the office of clerk to the trades of Aberdeen, during his life; 'and, therefore, reduce the act of the conveener court called for, in ſo 'far as it nominates James Watſon aſſiſtant-clerk, during John Taylor's 'life, and continuing in office, and decern. And, as to the point, how 'far the convenery court have power to name James Watſon clerk to 'the trades, after John Taylor's death, find it premature to determine 'that point, until the death or demiſſion of the ſaid John Taylor.'

A reclaiming petition for Mr Watſon againſt this interlocutor was refuſed, without anſwers.

A. E.

For Taylor, *Alex. Wight.*

For Watſon, *Robert Blair.*

No. LIX.

No. LIX. *July* 31. 1767.

Mr ALEXANDER LOCKHART, *Dean of Faculty*;

Againſt

The EARL *of* EGLINTON.

IMPLIED CONDITION.

In a bond payable by an heir of proviſion.

ALEXANDER, late Earl of Eglinton, upon the narrative that he had diſponed his whole eſtates in favour of Katharine, Counteſs of Galloway, his eldeſt daughter, with power to burden, gifted and diſponed to Alexander Lockhart, his grandſon by another daughter, the ſum of 10,000 merks, payable the firſt term after his deceaſe, with which he burdened the Counteſs of Galloway, his univerſal diſponee. The deed reſerves power to alter, and diſpenſes with delivery.

The Earl having afterwards had iſſue male by his third marriage, executed two entails of his eſtates, in favour of a different ſeries of heirs, who are expreſsly burdened with his debts and childrens proviſions, without any mention of the bond to Mr Lockhart.

That bond had been granted in 1713, but did not come to Mr Lockhart's knowledge till 50 years thereafter, when it having been tranſmitted to him in a blank cover, he brought an action upon it againſt Alexander, then Earl of Eglinton, the ſon of the granter.

Pleaded for the purſuer: Revocation of legacies aud donations is not to be preſumed; L. 22. *D. de probat.* L. 22. *D. de legat.* 2. *Voet. ad tit. de legatis, num.* 1. And even, conſidering the bond in the light of a codicile to the ſettlement of the eſtate, the alteration of the latter would not imply a revocation of the former. *Voet. ad tit. de jure codicil. n.* 5.

The faculty reſerved in the ſettlement in favour of Lady Galloway, ſeems to be mentioned with no other view than to remove every doubt as to the powers of the granter. It cannot be ſuppoſed, that the Earl intended to burden the *perſona praedilecta*, and not his other heirs, ſo that, if failing her, any other ſubſtitute had ſucceeded, the donation muſt have been effectual.

As therefore the bond was not pendent upon the condition of the ſucceſſion of Lady Galloway, who was only mentioned *demonſtrative*, as the heir then intended, and who, in that character, fell to be burdened with the payment; ſo it cannot be affected by the alteration of that ſettlement. The bond is pure and abſolute, and cannot be cut down by a poſterior

poſterior univerſal diſpoſition, *ubi aliud agebatur*; as was found, 16th December 1712, Monro *contra* Monro.

Anſwered for the defender: The bond does not aſſign any particular ſubject to the purſuer, which he could affect as a ſpecial legatee; neither does the Earl burden himſelf or his heirs general, ſo as that the purſuer can have action againſt them; the bond proceeds on the narrative of the diſpoſition to Lady Galloway, and, as ſhe only is burdened with it, ſo, upon the revocation of that diſpoſition, the bond came to an end. It is ſimilar to a legacy payable by a conditional inſtitute; if the condition of the inſtitution fails, the legacy fails alſo.

The queſtion here is not, whether the bond was revoked, but whether any effectual obligation was created by it. And, at any rate, though the Earl made this bond a burden upon the proviſional ſucceſſion of a diſponee, not *alioqui ſucceſſura*, the preſumption is natural, that he did not mean to impoſe any ſuch burden upon the legal heir of his honours and eſtates, to whom he has tranſmitted them, without any mention of this bond.

'The Lords ſuſtained the defences, and aſſoilzied.'

G. F.

Act. *Ilay Campbell.* Alt. *Macqueen.*

No LX. *Auguſt 7.* 1767.

JOHN BAXTER;

Againſt

The PARISH *of Crailing.*

Maintenance of Poor, Whether a Burthen on the Pariſh of their Birth, or where they reſided laſt three Years?

JOHN BAXTER was born in the pariſh of Crailing, where he reſided for about 40 years; he afterwards left that pariſh, and reſided in the pariſhes of Eckford, Maxton, and Roxburgh, in each of which, he reſided for more than three years. When paſt 80 years of age, and unable to maintain himſelf, he applied to the pariſh of Crailing, where he was born, to be admitted on the poors roll of that pariſh; and, being refuſed, brought an action, before the ſheriff of Roxburgh, againſt that pariſh, in which it was admitted that Baxter was born in the pariſh of Crailing. The ſheriff found that pariſh bound to maintain him.

The pariſh of Crailing preſented a bill of advocation; and the pariſhes of Eckford, Maxton, and Roxburgh being called, the queſtion

ſtion came to be tried, whether the pariſh where Baxter was born, or that in which he reſided the laſt three years, was bound to maintain him?

Argued for the pariſh of Crailing: The 18th act of parliament 1672, lays the burden of maintaining the poor upon that pariſh in which they have reſided for the laſt three years; and, as it is admitted that Baxter has reſided for more than the laſt three years in the pariſh of Roxburgh, that pariſh muſt maintain him; and ſo was determined 29th June 1737, Kirk-ſeſſion of Invereſk *contra* Kirk-ſeſſion of Tranent; and again, 5th June 1745, Pariſh of Dunſe *contra* Pariſh of Edrom. And it was ſaid, that the univerſal practice had been, to burden the pariſh where the poor had reſided the laſt three years; and that altering that practice, and finding the pariſh where the poor perſon was born to be the place where he muſt apply for maintenance, would be attended with numberleſs difficulties and inconveniencies.

Anſwered: The 22d act of parliament 1535, fixes the maintenance on the pariſh where born; and this act is ratified, and the ſame again enacted by 25th act 1551. But as, in ſome caſes, the pariſh in which the poor perſon was born might not be known, in that event, the 74th act 1579, laid the burden of maintenance on the pariſh where they had reſided the laſt ſeven years; and the ſame is more particularly explained by 16th act 1663. Nor does the act 18th 1672, alter the law in this particular; on the contrary, it refers to the former ſtatutes. And, by ſeveral acts of the privy council, between 1692 and 1698, particularly one in 1693, it is declared, that the pariſh, in which the poor were born, ſhall maintain them, when that can be known; and, where that is not certain, the pariſh where they laſt reſided for the ſpace of ſeven years; and theſe acts of the privy council were ratified in parliament, by 43d act 1695, and 21ſt act 1698; and this very queſtion was determined, 3d March 1757, Kirk-ſeſſion of Invereſk *contra* Kirk-ſeſſion of Tranent.

Lord Auchinleck Ordinary reported the queſtion to the court; and, before adviſing, the court ordered inquiry to be made as to the practice; and, it appearing to be the general practice, that the pariſh where the poor perſon reſided for the laſt three years was burdened with the maintenance,

'The Lords found, that John Baxter was entitled to be maintained 'by the pariſh of Roxburgh, as the pariſh where he reſided during 'the immediate three years preceeding his application for charity.'

A. E.

For the pariſh of Crailing, *John Swinton*, 3tius. For John Baxter, *P. Murray*. *Tait*, Clerk.

No. LXI. *December* 4. 1767.

Sir ALEXANDER M'KENZIE *of Gairlock, Baronet, Purſuer;*

Againſt

HECTOR M'KENZIE, *younger, of Gairlock, and* RODERICK M'KENZIE *of Redcaſtle, his Tutor* ad litem, *Defenders.*

Homologation.

SIR Alexander M'Kenzie of Gairlock, father to Sir Alexander the purſuer in this action, ſucceeded his father Kenneth in the eſtate of Gairlock, as neareſt heir, without any fetters or limitations whatever.

In 1730, Sir Alexander, by his marriage-contract with Mrs Janet M'Kenzie, bound and obliged himſelf to make due and lawful reſignation of the lands and barony of Gairlock, and 'that in favours, and for 'new infeftments of the ſame to be made, given, and granted to him 'the ſaid Alexander M'Kenzie of Gairlock *in liferent*, and the heirs-'male to be procreate betwixt him and the ſaid Mrs Janet M'Kenzie *in* '*fee*; which failing, to him the ſaid Alexander M'Kenzie of Gairlock, 'his heirs-male and aſſignees whatſoever.' Of this marriage, Sir Alexander had iſſue; Alexander the purſuer, two other ſons, and a daughter.

In 1752, Sir Alexander executed a tailzie of his whole eſtate in favours of the purſuer, his eldeſt ſon, and the heirs-male of his body; whom failing, his other ſons, &c.; and this tailzie contained ſtrict, prohibitive, irritant, and reſolutive clauſes, *de non alienando et contrahendo debita.* The terce and courteſy are debarred and excluded. The heirs of entail are allowed to provide their wives in a proviſion, not exceeding a third of the free rent, after diſcounting former liferents ſubſiſting, intereſt of debts, and annual burdens. They are likewiſe empowered to provide younger children, but under reſtriction, that the whole burden affecting the eſtate for the proviſions of the younger children of the heirs of tailzie, ſhall not exceed L. 1000 Sterling, affecting the eſtate at one time. And it is further declared by the tailzie, that no adjudication, or other legal execution, for ſecurity or payment of theſe proviſions, ſhall affect the fee or property of the eſtate. Upon this tailzie, Sir Alexander expede charters, and paſſed infeftments, in which the whole conditions and proviſions of the tailzie were ingroſſed. And the tailzie was, in 1753, recorded in the regiſter of tailzies.

In 1755, the purſuer Alexander, the ſon of the tailzier, married Margaret M'Kenzie, daughter to Redcaſtle; and, in December 1755, a poſtnuptial contract of marriage was entered into, whereby the purſuer, and his father, Sir Alexander M'Kenzie of Gairlock, on the one part, and Mrs Margaret M'Kenzie, with conſent of her father, on the other part, 'in con-

'templation

templation of the marriage, and in implement of the minutes of agreement made on that occaſion, the ſaid Sir Alexander M'Kenzie, who has already ſettled his ſucceſſion of his whole lands and eſtate of Gairlock upon his eldeſt ſon Alexander aforeſaid, and his heirs of tailzie and proviſion, mentioned in the ſaid ſettlement, hereby, in the mean time, provides his ſaid ſon and heir preſumptive, till the right of ſucceſſion ſhall open to him, by the demiſe of his ſaid father, to an eſtabliſhment out of any part of ſaid lands and eſtate that ſhall be thought moſt convenient, equivalent to L. 70 Sterling, *per annum*, free of all burdens and deductions whatever.'

The contract contains a clauſe, impowering Alexander the ſon, to provide his younger children on the eſtate, to the extent of L. 1000 Sterling, to be divided among them, if three or more in number. 'Provided always, that the ſaid portions and proviſions ſtand excluded, and take no place, till all other proviſions or eſtabliſhments made by the ſaid Sir Alexander M'Kenzie, in favours of his own younger children, be ſatisfied and extinguiſhed, in whole or in part; and, if in part only, that theſe proviſions in favours of ſaid younger or other children of the preſent marriage, ſhall be reſtricted and reduced to the amount of ſuch partial payment only, in ſuch manner as not to exceed what is ſatisfied and paid of ſaid other proviſions, and ſo as the whole of theſe proviſions together, both the preſent and what is outſtanding of the other, may never exceed L. 1000 Sterling in all. Provided alſo, that no adjudication or other legal execution be competent againſt the fee or property of the ſaid lands and eſtate of Gairlock, or any parts thereof, for payment or ſecurity of the ſaid younger or other children of this preſent marriage, their proviſions aforeſaid, but that the perſons only of the heirs of tailzie for the time, and any other eſtate, real or perſonal, belonging to them, as alſo the yearly rents and profits of the ſaid eſtate of Gairlock, be ſubject to all diligence for that effect.'

Of this marriage there was iſſue one ſon, Hector; and the marriage being diſſolved by the predeceaſe of the wife, Alexander the purſuer entered into a ſecond marriage, by which he had ſeveral children.

Sir Alexander, the father, died in 1766, and Alexander the ſon, conſidering himſelf as improperly fettered by the foreſaid deed of entail, particularly, that he was diſabled from providing properly for his younger children, brought an action for reducing ſaid tailzie, in which he called as defenders, his ſons of the firſt and ſecond marriages, and others called, by ſaid deed of entail, to the ſucceſſion; and the action concluded for reduction of the tailzie, charters, and infeftments following thereon; in reſpect that, by Sir Alexander ſenior his contract of marriage, the eſtate being provided to the heirs-male of the marriage, Sir Alexander could not limit his ſon the purſuer's right and intereſt in that eſtate, by a gratuitous deed of entail.

Pleaded for the purſuer: By the marriage-contract 1730, Sir Alexander provides the eſtate only to himſelf *in liferent*, and the heirs-male of the marriage *in fee*. And from the contract, it appears, that the fee which neceſſarily remained with Sir Alexander, before the exiſtence of an heir-male of the marriage, can be conſidered only as a fiduciary fee, which he held in truſt for behoof of the heir-male of the marriage, and

of

of which the heir male could have denuded him, even in his life-time; and if ſo, he could not lay the heir-male under the fetters of a ſtrict entail.

But even, conſidering the ſettlement in the ordinary form, and that the father was intitled to remain proprietor during his life, ſtill the entail was *ultra vires* of Sir Alexander, as he thereby counteracted the obligations he lay under to the heir-male of the marriage, by his marriage-contract. Where an eſtate is ſettled in a marriage-contract, the heir of the marriage is creditor to the father, to the full amount of the eſtate. If a father contract debts, he is under an obligation to purge them; an action is competent to the heir of the marriage againſt his father's other repreſentatives, and ſeparate ſubjects, to relieve the eſtate of theſe debts; Fotheringhame *contra* Fotheringhame, 5th December 1734; M'Intoſh *contra* Laird of Aberarder, 2d January 1717. And if Sir Alexander was under an obligation to give the eſtate to his ſon, *tanquam optimum maximum*, and to purge it of debts, it cannot be maintained that it was in his power to fetter the heir with a ſtrict entail, whereby he was reduced to the ſtate of a naked liferenter. The onerous debts of the father muſt affect the heir of the marriage, becauſe the fee remaining in the father, the ſon, as heir of proviſion, muſt neceſſarily repreſent him; and, in like manner, he muſt be liable for ſuitable proviſions to the younger children, the father being under a natural obligation to provide his children; but, if the father has a ſeparate eſtate, the heir is intitled to be relieved of all ſuch debts and burdens; and if ſo, an heir cannot be burdened with a ſtrict tailzie, which is a mere voluntary gratuitous deed of the father, which he was under no obligation, either civil or natural, to grant. And this tailzie ought the more eſpecially to be ſet aſide, as it contained ſundry unreaſonable reſtrictions and limitations, particularly as to providing younger children, &c.

It has been ſaid, that the purſuer is now barred from challenging this entail, having homologated the ſame in his own marriage-contract, where, under the character and deſcription of heir of tailzie and proviſion to his father, he accepts of an yearly aliment; and that the childrens proviſions in that contract are conceived in terms of the tailzie. But, ſuppoſing that the purſuer had, in his marriage-contract, homologated this entail in the moſt expreſs manner, it would not have barred him from inſiſting in this reduction, if otherwiſe competent. In order to give effect to any deed, there muſt be a free conſent upon the part of the granter; but, when the purſuer entered into his contract of marriage, he was not only under the awe and authority of a father, but entirely dependent upon him for ſubſiſtence, being then married, without either fortune or employment to depend upon, and obliged to truſt altogether to his father's generoſity; and, in theſe circumſtances, would naturally accept of an aliment or proviſion for children, under any terms the father thought proper to preſcribe. It is a general rule in law, that homologation of a deed to a man's prejudice, is not to be inferred from any act of the party which can admit of another conſtruction. The only purpoſe of the marriage-contract was to ſecure to the purſuer an aliment during his father's life, and proviſion for wife and children; but *non agebatur*

by

BIBLIOTHECA BODLEIANA

by the marriage-contract, to renounce any right or intereſt, otherwiſe competent to the purſuer, or to approve of any deed to his prejudice.

Anſwered for the defenders: Although Sir Alexander M'Kenzie, the father of the purſuer, by his contract of marriage in 1730, provided the eſtate to the heirs of the marriage, he ſtill remained fiar, and had full power to make rational deeds. It has been found by the court, that a father had power to alter the proviſions, and even the order of ſucceſſion made in his marriage-contract, upon good reaſons occurring; Douglas *contra* Douglas, 10th July 1724; Trail *contra* Trail, 7th January 1737; and, if he can alter the order of ſucceſſion, he may certainly execute rational deeds regulating the ſame; and the entail in queſtion is a rational deed; it is deviſed to the ſame ſeries of heirs with the contract of marriage; nor is the limitations of the proviſions to the younger children any ground of complaint. This eſtate is of very conſiderable yearly rent, in a country where every neceſſary of life is purchaſed on the moſt moderate terms; and, with tolerable oeconomy, the younger children may be provided without burdening the eſtate one ſhilling; ſo that, upon the general point, the queſtion is in favours of the defenders.

But, if there was any doubt on the general point, it would not aid the purſuer, as he is barred from challenging this entail, having homologated it in the ſtrongeſt manner in his own contract of marriage. The purſuer was, at the time of executing that contract, 25 years of age; he knew of his father's contract of marriage, and entail executed by him, which had been regiſtrated ſeveral years before; and, upon the ſecurity of which it was, that the purſuer's wife and her relations reſted for the eſtate coming to the heir of that marriage; and, therefore, the purſuer, on that ground alone, muſt be barred from reducing this entail.

'The Lords found the purſuer barred, by his contract of marriage, 'from reducing the entail in queſtion; and, therefore, aſſoilzie from 'the reduction and decern.'

And adhered, upon adviſing a reclaiming petition for the purſuer, with anſwers for the defenders.

A. E.

For Sir Alexander M'Kenzie, *Ro. Macqueen.*
For Hector M'Kenzie, *James Boſwell.*

No. LXII. *December* 19. 1767.

SPOTTISWOOD of Spottiſwood;

Againſt

COPLAND of Collieſton, and others.

KIRK-PATRIMONY.

Superiority of Lordſhips of Erection.

THE queſtion occurred, upon the ſame *ſpecies facti*, as in N. C. II. 93.; 4th February 1758, Spottiſwood of Spottiſwood *contra* Creditors of Naſmyth of Earlſhaugh, where a vaſſal of the Abbacy of New Abbey was found intitled to hold of the crown.

Here, however, the judgment was different; and Spottiſwood prevailed in a declarator of ſuperiority and non-entry, againſt Copland elder and younger of Collieſton, and certain other vaſſals of the Abbacy.

Some time before, a ſimilar action had been brought by Spottiſwood againſt Burnet of Craigend, one of the vaſſals; and the interlocutor pronounced by the Lord Ordinary, in that caſe, will ſufficiently point out the principles upon which the preſent queſtion was decided.

'Found, that as the charter from the crown in favour of the purſuer, 'anno 1742, proceeds upon the narrative of the charter 1624, the ſigna-'ture 1641, the ſignature 1660, the declaration of parliament 1695, and 'the decreet of the court of ſeſſion 1740, that charter ought to receive 'the moſt liberal conſtruction, in order to reſtore the purſuer to the full 'right and title of the lands and barony of New Abbey, &c. as the ſame 'ſtood in the perſon of Sir Robert Spottiſwood, the purſuer's great grand 'father, in the 1634, when he reſigned the ſame into the hands of the 'crown, for a price that was never paid: Found, that, by virtue of the 'charter 1624, and the act of diſſolution 1633, Sir Robert Spottiſwood 'was, in the year 1634, intitled to the ſuperiority of the lands formerly 'held of the abbacy of New Abbey: Found, that the act 1690, decla-'ring the ſuperiorities which pertained to biſhops, to belong to the crown, 'ought not to be extended to the ſuperiority of New Abbey, in reſpect 'that, by the declaration of parliament 1695, it is declared, that the act '1662, reſtoring biſhops to their poſſeſſions, as in the year 1637, did 'not prejudge the purſuer's father: And therefore found, that the pur-'ſuer is intitled to the ſuperiority of the defender's lands in queſtion, 'which had confeſſedly been held of the abbey of New Abbey; and 'that theſe lands are in non-entry.'

The interlocutor was altered, upon a petition, and the court found, 'That James Burnet is intitled to hold his lands of the crown.' But, upon

upon an appeal, this judgment was reverſed, and that of the Lord Ordinary affirmed.

Mr Copland endeavoured to diverſify his caſe from that of Craigend; but without ſucceſs: And accordingly the Lords 'repelled the defences, 'and decerned in the declarator.'

G. F.

Act. *Lockhart, David Dalrymple.* Alt. *Maclaurin, Crosbie.*

No. LXIII. *January* 27. 1768.

ANNE MACLAUCHLAN;

Againſt

JOHN MACLAUCHLAN.

TAILZIE.——IRRITANCY.

Of a ſmall burgage tenement.——Not incurred by a truſt diſpoſition for reducing the tailzie.

A Formal tailzie was executed of a ſmall burgage tenement of a few acres of land, worth L. 10 of yearly rent, with all the clauſes uſual in tailzies of great eſtates, for taking the name and arms of the family, allowing proviſions to children to the extent of three years free rent, &c.

John Maclauchlan, the heir in poſſeſſion, and whoſe ſon was excluded by the tailzie, wiſhing to ſet it aſide, diſponed the lands in truſt, with a view of bringing a reduction in name of his truſtee.

The next ſubſtitute, Anne Maclauchlan, brought a reduction and declarator of irritancy, in which ſhe founded upon the truſt diſpoſition as an act of contravention.

Objected, 1*mo*, Tailzies were introduced for ſecuring the ſucceſſion to *eſtates* properly ſo called, and not for perpetuating a trifling burgage-tenement, like that in queſtion.

2*do*, The mere granting a diſpoſition does not infer an irritancy till infeftment be taken, agreeably to the principle eſtabliſhed, Home, 18th July 1722, Scot of Gala *contra* creditors of Gala, and ever ſince underſtood to be law, that the contracting of debt does not irritate the right of the heir contraveening, till it be made real upon the eſtate by adjudication.

Anſwered to the 1*ſt*: The act 1685 is general, extending to all lands without diſtinction; and tailzies even of houſes in boroughs are not uncommon.

To

To the 2*d*: The clauſe in the tailzie is expreſs, That it ſhall not be lawful to ſell or impignorate the ſubjects; and the prohibition is fortified with a proper irritant and reſolutive clauſe. The irritancy is declared to operate *ipſo facto*, and therefore cannot be purged. This was found, even in the caſe of the ſtatutory irritancy, incurred by neglecting to ingroſs the clauſes of the tailzie in a general retour, Home, 1ſt February 1726, Denham *contra* Denham; and it muſt hold *a fortiori* in conventional irritancies, to which greater weight is juſtly given.

'The Lords found that the entail is valid: But, in reſpect the ſale 'was only intended to try the queſtion, whether or not the entail 'was good, and was qualified by a back-bond to that purpoſe? 'found, that no irritancy is incurred by the ſaid ſale; and there-'fore aſſoilzied the defender from the concluſions of the declarator, 'but ſuſtained the reaſons of reduction of the truſt diſpolition.'

G. F.

Act. *Blair*. Alt. *G. Buchan-Hepburn*. Reporter, *Kennet*.

No. LXIV. *February* 19. 1768.

G R E I G;

Againſt

G R E I G.

PRESUMPTION.

Debitor non praeſumitur donare.

MARGARET MILL, upon the death of her firſt huſband, married David Greig, who, by his teſtament, appointed her his executor, and gave her the liferent of his effects, computed at about 7000 merks; whereof, 2000 merks was provided to each of his two daughters, 3000 merks to his youngeſt ſon, the eldeſt being already foriſfamiliated.

Margaret Mill, having entered upon the management of her huſband's affairs, lent out L. 100 Sterling, upon bond, to herſelf in liferent, and her two daughters in fee.

Upon the death of Margaret, the daughters claimed this L. 100, beſide their proviſions of 2000 merks. But the Lords found 'that it muſt 'impute in ſatisfaction *pro tanto*.'

G. F.

Act. *Nairne*. Alt. *Lockhart*.

No. LXV.

No. LXV. *March* 3. 1768.

H A R D I E;

Againſt

B L A C K.

PERICULUM.

Between Proprietor and Tenant.

A Fire having broke out in a room of an upper floor, where the tenant had erected a comb-pot for dreſſing wool, and conſumed the houſe, an action was brought by the proprietor for indemnification.

It appeared, that it was not unuſual, however dangerous, to erect ſuch furnaces, even in the upper floors of houſes; but that certain precautions were generally uſed to prevent the fire from being communicated to the houſe, which had been neglected in this caſe. It alſo appeared, that the proprietor was in the knowledge of the uſe to which the room was applied, ſome time before the fire happened.

The defender *contended*, that it was not every degree, even of neglect, that would ſubject the perſon to damages, in whoſe houſe a fire broke out; and, in proof of that propoſition, referred to *L.* 2. *de Incendio*; *L.* 2. *D. de Peric. et commod. rei vend.*; *Voet. ad tit. ad leg. Aquil. num.* 20. In England, there is a ſpecial ſtatute, 6th Ann. ch. 30. which declares, that no action ſhall be competent for damages againſt any perſon in whoſe houſe, or chamber, a fire ſhall *accidentally* begin. In Scotland, there ſeemed to be no neceſſity for any ſuch ſtatute. No action was underſtood to lie, except in the caſe of wilful fire, as may fairly be concluded from this, that no action ever was attempted upon that medium, till the caſe of Sutherland *contra* Robertſon, 14th December 1736, where the negligence of the tenant was exceedingly groſs.

Anſwered: The defender was guilty of neglecting the precautions commonly uſed in ſuch caſes, for preventing the danger of fire; and muſt, therefore, be liable to make up the loſs which has been ſuſtained, in terms of the ſtatute 1426. c. 75. Various paſſages were alſo referred to from the civil law, particularly from the title *Ad legem Aquiliam.*

But it is unneceſſary to be more particular. The principles upon which the deciſion proceeded are fully pointed out in the interlocutor.

‘ The Lords found, that the comb-pot was erected in an improper ‘ manner, and that proper precautions had not been taken to pre- ‘ vent fire; and, therefore, found the defender liable in damages ‘ to the purſuer, and in expences of proceſs.’

G. F.

Act. *Armſtrong.* Alt. *Wight, Buchan-Hepburn.* Reporter, *Coalſton.*

No. LXVI. *March* 3. 1768.

E L L I O T;

Againſt

S C O T.

B A N K R U P T.

A ſimple Arreſt, if equivalent to Impriſonment within the Act 1696?

THE common debtor, having been apprehended upon caption, eſcaped impriſonment, by finding ſecurity in a bond of preſentation, but failed to appear; whereupon a proteſt was taken, and diligence raiſed upon the bond.

In a ranking, certain ſecurities, granted within 60 days of the arreſt, were objected to, as falling under the ſanction of the ſtatute 1696.

Pleaded for the objector: 1*mo*, The deſign of the ſtatute was to provide a remedy againſt the frauds of bankrupts; and, though it ſpecifies certain particular alternatives, the remedy was meant to extend to every caſe where ultimate perſonal diligence ſhould be uſed, without effect. Equivalents, therefore, will ſupply the place of thoſe alternatives. Being in the cuſtody of a meſſenger is equivalent to actual impriſonment: A ſiſt, on a bill of ſuſpenſion, is equally ineffectual in the one caſe as in the other: And, though a ſimple arreſt may be attended with leſs notoriety than impriſonment, it is more publicly notorious than the other alternatives of abſconding or deforcement. Upon theſe principles, it was determined in the houſe of Lords, that a debtor, being actually in the cuſtody of a meſſenger, was impriſoned in the true intent and meaning of the act 1696.; 18th February 1755, creditors of Woodſtone *contra* Scot.

2*do*, The debtor became notour bankrupt in another view, by failing to appear in terms of the bond of preſentation, which muſt be conſidered as abſconding from diligence.

Anſwered to the 1*ſt*: The ſtatute is correctory, and, therefore, does not admit of equivalents. Accordingly, incarceration on an act of warding, is not deemed impriſonment within the ſtatute: Far leſs will detention for an hour or two in the hands of a meſſenger; a thing which might well eſcape the obſervation of the lieges, who would be inſnared by ſuch an extenſion of the law. The deciſion, in the caſe of the creditors of Comiſton, is a ſingle judgment, and hardly reconcileable to principles.

To the 2*d*: The debtor may have failed to preſent himſelf from different accidental circumſtances, without an intention to abſcond, which will not be preſumed without evidence.

'The

'The Lords found, that, although the principal debtor be proved to 'have been in the cuſtody of a meſſenger, in virtue of letters of 'caption; yet this, joined with inſolvency, is not ſufficient to con- 'ſtitute him a bankrupt, in terms of the act 1696.'

G. F.

For Elliot, *Wight*. Alt. *Crosbie*.

No. LXVII. *June* 21. 1768.

SMITH;

Againſt

THOMAS HAMILTON-MACGILL of Falla.

TACK.

Heritor may ſit down for coal in lands ſet in tack.

IN this caſe it was found, 'That the heritor has right to ſearch and 'put down ſinks for coal, in lands ſet in tack, upon ſatisfying the te- 'nant for the damage which may be thereby incurred.'

The tenant admitted, that the right to the minerals remained in the heritor; but contended, that he was not intitled to break up the ground during the currency of the leaſe, in reſpect there was no ſtipulation for that purpoſe.

G. F.

Act. *Rae*. Alt. *Blair*.

No. LXVIII. *July* 1. 1768.

Mrs MARY KELSO;

Againſt

WILLIAM and GEORGE BOYDS.

PROPERTY.

If a ſuperior heritor can divert a rivulet from the inferior tenement?

THE queſtion was, whether the defenders were intitled, for the pur- poſe of watering their meadows, to divert a rivulet, which paſſing through their property, run into that of the purſuer, from whom they held their lands in feu.

There

There was no ſervitude conſtituted in favour of the purſuer by grant; nor was the uſe of employing the water for fertilizing her meadows alledged to have ſubſiſted 40 years.

Argued for the defenders: Though it is not in the power of a ſuperior heritor, by any *opus manufactum*, to force the water out of its natural courſe, upon the lands of his neighbour, and to his prejudice; yet he is intitled to apply the water on his own grounds to every neceſſary and proper uſe; he may even prevent it from deſcending upon his neighbour's grounds entirely, if this be not done *in aemulationem*.

The diſtinction is pointed out in various texts, as *L.* 2. § 9. *L.* 1. 21. *D. de aqu. et aqu. pluv. arc. L.* 10. *C. de ſerv. et aqu.*: And the reaſon of it is given in *L.* 21. § 23. *D. eod.* Nature has impoſed a ſervitude upon inferior grounds, of receiving the water of the ſuperior, which is underſtood to be made up, by the ſoil and manure which the water brings along with it; and, at any rate, muſt be ſubmitted to by the proprietor, from the neceſſity of the thing, without any conventional ſervitude. But there is no ſuch natural ſervitude upon the ſuperior heritor, and law could not impoſe it without injuſtice, ſince he derives no advantage from the inferior. Accordingly, Lord Bankton lays it down, II. 7. 29. that 'the owner of the higher ground may wholly intercept 'the water within his own grounds, and hinder it from running into the 'lower, unleſs the heritor of it has a ſervitude upon him.'

Anſwered: The purſuer has not perhaps inſtructed a practice for 40 years, of artificially diverting the water for the uſe of her meadows; but, from time immemorial, the rivulet has overflowed them naturally, and thereby contributed to their fertility.

That a navigable river cannot be diverted, is laid down *L.* 10. § *ult. D. de aqu. et aqu. pluv.* The ſame doctrine is eſtabliſhed with reſpect to ſmaller runs of water, *L.* 4. 7. *C. de ſervit. et aqu.* And this is not contradicted by the laws referred to by the defenders, which will be found to relate not to perennial runs of water, or rivulets, but to collections of rain-water, falling upon the ſuperior grounds, or to ſprings riſing in them, which, according to the doctrine of thoſe laws, may be applied to the neceſſary uſes of the proprietor.

Lord Stair gives his opinion, that, 'without a ſervitude, water may '*not* be altered or diverted from its courſe,' II. 7. 12. And ſo it was decided, 25th June 1624, Bannatyne *contra* Cranſton; and more lately in the queſtion between the town of Aberdeen and Menzies, 22d November 1748.

'The Lords found, that the defenders have no right to divert the wa-
'ter of the rivulet within their own grounds, ſo as to prevent its
'returning into its natural courſe, upon entering into the lands of
'the purſuer.'

G. F.

Act. *Rae.* Alt. *Macqueen.*

No. LXIX.

No. LXIX. *July* 6. 1768.

SHEDDAN;

Againſt

SPROUL CRAWFORD.

LOCUS POENITENTIÆ,

Not barred by an informal writing.

HUGH SPROUL-CRAWFORD became bound, by a minute of ſale, to diſpone the lands of Haining, to Thomas Sheddan, at the price ſtipulated in the minute, which was ſigned by both parties, and bore to be 'written by Hugh Sproul-Crawford, before theſe witneſſes, Alexander Paterſon and John Lang.'

It was lodged with John Lang, one of the witneſſes, and ſundry communings enſued reſpecting the cautioners, whom Crawford agreed to accept; and alſo relative to the making up of proper titles.

At length Crawford declared his intention to reſile from the bargain; and an action having been brought by Sheddan, *objected*, that the minute was null, in reſpect it was written on paper not ſtamped, and did not deſign either the writer or witneſſes.

Anſwered: A holograph offer, with a holograph acceptance, would have been binding, without witneſſes. In this caſe, the offer and acceptance are contained in one writing, which is holograph of the defender; and, as it is impoſſible that a writing ſhould be holograph of two perſons, it is enough that it is holograph of the one, and ſigned by the other.

2*do*, At any rate, the defender is bound by his own holograph writing, and the only queſtion is, whether he can get free, upon the footing that no effectual obligation was conſtituted againſt the purſuer? But the purſuer homologated the deed, by ſigning it; by lodging it in the hands of a third party, ſo that he could not afterwards deſtroy it; by delivering a letter from his cautioners, and by bringing his action.

The act 1681 does not annul deeds in which the legal ſolemnities have been neglected; it only furniſhes an exception to the party, who may wave it, either expreſsly, by acknowledging his ſubſcription, or tacitly, by acts of homologation. So it was found, 17th February 1715, Sinclair *contra* Sir James Sinclair, obſerved by Bruce; and ſo our law has been underſtood to ſtand from the moſt antient times, as appears from *Reg. Maj.* III. 8. 4. & 5. where the acknowledgement of the ſeal is held to be ſufficient to ſupport the deed. Upon the ſame principles,

deeds defective in other ſolemnities have been ſuſtained, in conſequence of an acknowledgement of the ſubſcription, upon a reference to oath; 26th December 1695, Beattie *contra* Lambie; and there is no reaſon why a voluntary acknowledgement ſhould not be equally effectual.

Replied: Unilateral deeds only can admit of being holograph; but the minute was not of that nature; it was a mutual contract, in which the rule is, that both parties muſt be bound, or neither: And, as it is clear, that the purſuer was not bound, it follows, that the defender muſt have been free, although the minute had, in other reſpects, been binding upon him, which it was not, as being a writing neither holograph, nor capable of being holograph, and deficient in the ſolemnities of the act 1681.

None of the facts condeſcended upon are ſuch as could have inferred homologation againſt the purſuer, ſo as to have bound him to ſtand to the minute againſt his will. And the deciſions referred to do not apply. An obligation for money may be created by a miſſive letter, or even by a verbal promiſe; but a bargain of ſale of lands cannot be effectually conſtituted without a formal writing.

'The Lords found, that the agreement libelled, not being wrote on 'ſtamped paper, and having no witneſſes deſigned, is not effectual 'to oblige the defender to convey a land eſtate.'

G. F.

Act. *John Dalrymple.* Alt. *Geo. Wallace.*

No. LXX. *July* 13. 1768.

JOHN RANDAL Taylor in Woolwich, and CORNELIUS ELLIOT Writer to the Signet, his Attorney;

Againſt

ALEXANDER and GEORGE INNES, Executors of the deceaſed Captain PETER INNES, late of the Train of Artillery.

TRIENNIAL PRESCRIPTION.

Applies to Debts contracted in England?

CAPTAIN Peter Innes of the royal train of Artillery, in the courſe of his ſervice, frequently reſided at Woolwich in England, particularly he was there in the years 1757, 1758, and 1759. He came to Scotland, in October 1759, where he reſided till his death, which happened in March 1765.

After Captain Innes's death, John Randal, taylor in Woolwich, brought an action before the court of ſeſſion, againſt Alexander and George

George Innes's, as executors to Captain Innes, for payment of an accompt, commencing the 8th January 1757, and ending 22d March 1760. Againſt this claim, the defenders objected preſcription, both upon the Engliſh ſtatute of limitations, and upon the triennial preſcription introduced by act 83. parliament 1579. Lord Auchinleck reported the queſtion to the court, when additional memorials were ordered, a doubt having ariſen how far the triennial preſcription could be applied to a debt contracted in England.

Pleaded for Randal: Though it, in general, is true, that municipal laws are only binding within the territory of that ſtate by which they are enacted; yet, in particular caſes, the law of foreign nations is received, and deeds, executed in other countries, are ſuſtained, if executed agreeable to the law of the country where dated, though defective in the ſolemnities required by the law of the country where they are made the ground of action. And, in Scotland, deeds executed in England, agreeable to the law of that country, have always been conſidered as effectual in the courts of this country, though defective in the formalities required by the law of Scotland; and ſuch being the rule, with regard to the conſtitution of obligations, it ſeems to follow, that, when queſtions occur as to their ſubſiſtence, the law of the country where they were executed, ſhould be the rule for determining. By the law of Scotland, payment of a bond cannot be proved by witneſſes; yet the payment of an Engliſh bond has been proved by parole-evidence in this court; M'Moreland *contra* Melvill, 28th June 1666; and ſeveral other deciſions, to the ſame purpoſe, are noticed in *Dictionary*, *voce*, *Foreign*.

Agreeable to the principles, upon which theſe caſes were determined, every queſtion relative to the endurance of obligations muſt depend upon the *lex loci contractus*; and, unleſs the law of that country has impoſed a limitation which would bar action in the courts of that country, the debtor, by retiring to another country, cannot benefit himſelf by any preſcription eſtabliſhed there. Limitations, or preſcriptions of actions, are derogatory to the common law of nations, and ought not to have effect againſt ſtrangers who muſt be ignorant of them. In this caſe, Randal contracted with Captain Innes at Woolwich, who, at the time of the furniſhings, had no *forum* in Scotland; and, by afterwards retiring into Scotland, he could not defeat the action now brought, as he or his adminiſtrators are, at preſent, unqueſtionably liable for the debt by the law of England. And, although a creditor muſt follow the *forum* of his debtor, as no man can be ſued in a court, to the juriſdiction of which he is not ſubject, it does not follow, that the creditor's right muſt depend upon the particular laws of that country to which the debtor has retired.

The laws of every country is a matter of fact, and capable of proof when contraverted. In the caſe of Cunninghame *contra* Brown, 18th January 1676, the court allowed a proof to aſcertain what was the law of England; but, in the preſent caſe, there can be no diſpute as to the law of England; and, therefore, it ought to be the rule of determining, which is agreeable to the opinions of our lawyers; Dirleton's Doubts, *voce*, *Proceſs againſt Strangers*; Bankton, vol. I. p. 32.; and the deciſions

ſions of the court, Phiiips *contra* Stamfield, 11th January 1695; Aſſignees of Faulks *contra* Aikenhead, November 1731; Rae *contra* Wright, July 1717; Grove *contra* Gordon, November 1740; M'Neil *contra* M'Neil of Tayniſh, 2d March 1761; and, therefore, the *lex loci contractus* ought to be the rule of judging.

Anſwered for the defenders: The laws of England have no more force in Scotland than the laws of any other foreign country; and it is a maxim in law, that, *extra territorium jus dicenti impune non pareri, l. ult. ff. de juriſd.* And this court, in its deciſions, has always held that rule in view; Savage *contra* Craig, 27th January 1710; Bains *contra* Earl of Sutherland, 21ſt June 1749; and, in a number of queſtions between aſſignees under a commiſſion of bankruptcy in England, and creditors in Scotland; Aſſignees of Dunlop, 6th March 1754. And this general principle, that the law of the country, where the action is brought, muſt be the rule of judging, is particularly applicable to the plea of preſcription; *Voet. Lib.* 1. *tit.* 8. § 30. and *Lib.* 44. *tit.* 3. § 12. and has been ſo determined by this court, as appears from various deciſions to be found in the *Dictionary*, *voce*, *Foreign*.

The defenders have no occaſion to diſpute that the *lex loci contractus* regulates the conſtitution of the contract; and, of courſe, a bond executed in England, agreeable to the Engliſh form, will be a good ground of action in this country; and a proof of payment made in England will be allowed by witneſſes; but which would not be the caſe, even of an Engliſh bond, if payment was made in Scotland; becauſe ſuch proof is not admitted by the law of this country. When an action is brought in this country, preſcription is an exception, which being competent by the law of this country, muſt be received; for, in ſuch caſes, it is not the *lex loci contractus*, but the *lex loci*, which is the law of the place where the action is brought, that muſt be the rule; *Huber de conflictu legum diverſarum in diverſis imperiis*. And, as the purſuer has brought his action in this country, and the preſcription known in the law of this country is pleaded in bar of that action, that plea muſt be ſuſtained or repelled by the rules of the law of Scotland.

'The Lords having adviſed the report made by the Lord Auchinleck, 'upon the 27th January laſt, with the memorials *hinc inde* given 'in, in obedience to the laſt interlocutor, they ſuſtain the defence 'of the triennial preſcription, aſſoilzie the defenders, and decern.'

For Randal, *Alex. Wight*. For Defenders, *Coſmo Gordon*.

A. E.

No. LXXI.

No. LXXI. *July* 14. 1768.

WILLIAM LIVINGSTON of Weſtquarter;

Againſt

WARROCK.

JUS TERTII.

Neither party can object to the right of the common author.

MARY Counteſs-Dowager of Callendar, as having right to the lands of Weſtquarter, by conveyance from Sir James Livingſton, her ſecond huſband, and a diſpoſition by Lady Newton, his niece, and heir of line, granted procuratory, with conſent of the Earl of Findlater, whom ſhe afterwards married, for reſigning thoſe lands in favour of herſelf, and the Earl her huſband, in conjunct fee and liferent, for the Earl's liferent-uſe allenarly, and of James Livingſton, ſon of Alexander Livingſton of Bedlormie, and his heirs-male, and other ſubſtitutes, in fee, with the prohibitory and irritant clauſes uſual in tailzies.

James Livingſton infeft himſelf on the procuratory, after the death of the Counteſs, and ſold the lands. Upon the death of James, his brother William ſerved heir of tailzie and proviſion to the Counteſs, and, having infeft himſelf upon the procuratory in the diſpoſition to her, prevailed in a reduction of the ſale of Weſtquarter, upon the ground that James had neglected to ſerve heir to the Counteſs, ſo that the lands ſtill remained *in haereditate jacente* of her; and that, ſuppoſing the perſonal right to be carried by James Livingſtone's infeftment without ſervice, yet he was barred from ſelling by the tailzie, the clauſes of which were ingroſſed in his infeftment. See N. C. II. 23. 9th March 1757, William Livingſton *contra* Francis Lord Napier.

The preſent queſtion reſpected a ſmall part of the eſtate, which James Livingſton had ſold to Andrew Henderſon. From Henderſon, it had come into the perſon of James Warrock, againſt whom a reduction was now brought by William Livingſton.

Pleaded for the defender: Allowing the purſuer's ſervice to have been regular, ſtill his title is exceptionable. The Counteſs of Findlater, to whom he ſerved, had no effectual right to the lands. For, 1*ſt*, Her author Sir James Livingſton, never having made up titles, could not diſpone *cum effectu*; the lands remained *in haereditate jacente* of William Livingſton, his father. 2*do*, The conveyance to the Counteſs was null and void, being executed in the form of a mutual contract, but wanting

witneſſes. 3*tio*, The diſpoſition by Lady Newton was ineffectual, in reſpect the lands ſtood deviſed to heirs-male.

Nor can the defender be barred from pleading theſe objections, as if they were *jus tertii* to him, and founded in the right of the heirs-male. Were he endeavouring to annul the purſuer's rights, and turn him out of poſſeſſion, there might be greater difficulty in the caſe. But, when the defender is himſelf in poſſeſſion, upon titles good *ex facie*, it cannot be *jus tertii* for him to found upon the right of another, when the effect of that plea is to continue him in poſſeſſion, and to exclude the purſuer, upon whom it is incumbent, firſt of all, to ſhow that he has a valid title, before he can be allowed to diſturb the perſon in poſſeſſion of the lands. Accordingly, in many caſes, it has been found competent for defenders to plead upon the rights of others, where thoſe rights were available to protect them againſt the claim of a third party. See the deciſions, Dict. *jus tertii*, § 1. & 2.

Anſwered: The deciſions referred to only prove, that the defender muſt be aſſoilzied, unleſs the purſuer inſtruct a title to the ſubject in queſtion. But, in this caſe, the purſuer ſupports his title ſufficiently, when he connects it with the Counteſs of Findlater, the common author. And ſo the law is clearly laid down by Lord Stair, IV. 35. 13. and Lord Bankton, IV. 43. 7. It is evidently *jus tertii* for the defender to object to the title of the Counteſs; becauſe, by doing ſo, he does not ſupport his own right, but effectually deſtroys it. At any rate, the right of the heir-male is out of the queſtion, being cut off by the negative preſcription.

'The Lords found, that it is not competent for the defender to chal-
'lenge the title of the Counteſs of Calendar, the common author
'both of purſuer and defender.'

G. F.

Act. *Macqueen*. Alt. *Lockhart*. Reporter, *Pitfour*.

No. LXXII.

No. LXXII. *July* 14. 1768.

PEWTRESS and ROBERTS;

Againſt

THOROLD, and other Aſſignees under the commiſſion of bankruptcy againſt THOMSON and TABOR.

FOREIGN.

Arreſters preferred to Aſſignees, under a Commiſſion of Bankruptcy, upon Funds which had become the Subject of Competition before the arreſtments.

UPON the 2d of November 1758, a commiſſion of bankruptcy was iſſued againſt Thomſon and Tabor merchants in London, and their bankruptcy certified to have commenced upon the day preceeding.

Thomſon and Tabor had drawn bills upon many of their debtors in this country, payable to William Cuming their agent here; and, recently before their bankruptcy, they drew upon Mr Cuming in favour of ſome of their creditors, and particularly of Pewtreſs and Roberts of Lombard-ſtreet, bankers.

Theſe bills were proteſted againſt Cuming for not-acceptance, whereupon arreſtments were uſed, and a competition enſued between the arreſters and the Engliſh aſſignees, (*See* No. LIV. *ſupra*, March 5th, 1767, Thorold, and other aſſignees of Thomſon and Tabor, *contra* Forreſt and Sinclair; p. 286.) in which the Lords found, 'That the aſſignees, under the commiſſion of bankruptcy, have ſufficient title to compear and compete; but that ſuch of the creditors-arreſters againſt whoſe diligence no objection is made, are preferable to the aſſignees under the commiſſion; but ſuſtained the objections made to the arreſtments uſed in the hands of William Cuming.'

During the dependence of this competition, Pewtreſs and Roberts laid ſecond arreſtments in Cuming's hands, and a new competition enſued.

Pleaded for Pewtreſs and Roberts: Theſe bills, drawn in their favour upon William Cuming, were equivalent to aſſignations of the effects in his hands; and the proteſts for not-acceptance are equivalent to intimation. The bills payable to Cuming were effects in his hands, attachable by arreſtment, as was found in a ſimilar caſe, 13th February 1740, Innes *contra* creditors of Gordon; at leaſt, they were capable of being aſſigned; and the draughts upon Cuming, being equal to aſſignations,

nations, muſt be preferable to the after diligence of other creditors, and, *a fortiori*, to the claim of the aſſignees, who can have no better right than the bankrupts themſelves would have had.

Nor is there any *res judicata* in this caſe: Whatever may have been found in competition with other creditors, cannot affect ſuch as were no parties to that competition. Indeed, all that has been found is, that the aſſignees are intitled to compear and compete; in other words, that, though deriving their powers from judicial proceedings in a foreign country, they have *perſonam ſtandi* here, and may operate preference by diligence, or object to the diligence of other creditors; but they cannot be conſidered in a more favourable view than truſtees for behoof of creditors, who, though named by the bankrupt, with the concurrence of the bulk of his creditors, are in no ſhape preferable to ſuch as refuſe to accede, unleſs in ſo far as they have acquired a preference by diligence.

Anſwered: Though a bill proteſted for not-acceptance may be conſidered in the light of an intimated aſſignation, where the perſon drawn upon has effects of the drawer in his hands, the caſe is different where he has no more than bills. And it was upon that ground that the arreſtments in Cuming's hands were found to be ineffectual. A writing, in the form of a bill, requiring Cuming to indorſe thoſe bills to the holder, would have been good for nothing; and the virtual aſſignation, ſuppoſed to be implied in the draughts in favour of Pewtreſs and Roberts, can have no ſtronger effect.

2*do*, The aſſignees, by judgment of the court, have been found intitled to compete; and, though they have been poſtponed to thoſe creditors who had uſed valid arreſtments prior to the competition, they are preferable to arreſtments executed after it. The ſums *in medio* became litigious by that competition, which muſt, at any rate, be conſidered as a ſufficient intimation of the aſſignment in their favour.

'The Lords preferred Meſſrs Pewtreſs and Roberts to the ſums in 'William Cuming's hands, to the extent of the draughts in their 'hands.'

G. F.

For the Aſſignees, *Macqueen, Blair.* Alt. *Solicitor Dundas*, &c. Pitfour *Reporter.*

No. LXXIII.

No. LXXIII. *July* 16. 1768.

HAIG, DAES, and Company;

Againſt

CAMPBELL.

JURISDICTION.

Inferior admirals, if competent to mercantile *cauſes?*

THE admiral-depute of Alloa having pronounced decree for the price of ſome Norway logs, the defender advocated the cauſe on the ground, that inferior courts of admiralty have no juriſdiction in cauſes purely mercantile.

Anſwered for the purſuer: The act 1592, c. 160. was only intended for repreſſing extraordinary and oppreſſive clauſes in grants of admiralty. The act 1681. c. 16. though it has been denominated the great charter of the court of admiralty, is not the meaſure of its juriſdiction. It relates only to the privative juriſdiction enjoyed by that court in *maritime* cauſes. The connection of maritime and mercantile cauſes had naturally led the high court of admiralty to judge in both, long before that ſtatute. That juriſdiction has been uniformly exerciſed, as far back as the practice can be traced, and it has been ſupported by ſeveral deciſions.

If the juriſdiction of the high court of admiralty extends to mercantile cauſes, that of inferior admirals, derived from the ſame authority, though limited in territory, muſt be equally extenſive in kind. And the deciſion N. C. II. 188. 27th June 1759, Miller *contra* Sawyers, proceeded on the ground, that the defender did not live within the territory of the admiral-depute, as fixed by his commiſſion.

Replied: The juriſdiction of the high court of admiralty, derived from ſtatute, relates to maritime cauſes only. Its juriſdiction in mercantile cauſes took its riſe from cuſtom, and cannot be carried farther than that cuſtom has gone, or extended to inferior admirals, who have not been in the practice of exerciſing it, as appears from the deciſion, Miller *contra* Sawyers, which ſhows, that, in 1759, it ſeemed a novelty to the court, for an inferior admiral to judge in cauſes not maritime.

For illuſtrating the point, the defender referred to Balfour, p. 629. c. 83. and 634 c. 100.

'The Lords found, that the admiral-depute had no juriſdiction in 'this caſe, and therefore ſuſtained the declinature, aſſoilzied the de- 'fender, and found the purſuers liable in expences.'

G. F.

Act. *Crosbie.* Alt. *Armſtrong.* Reporter, *Auchinleck*

No. LXXIV. *July* 22. 1768.

Mr GEORGE BROWN;

Againſt

The HERITORS *of Dunfermline.*

SCHOOLS.

Powers of presbyteries as to ſchoolmaſters ſalaries.

IN the beginning of the laſt century, the magiſtrates of Dunfermline, upon the narrative, that Anne of Denmark, queen to James VI. had mortified L. 2000 Scots, for that and other purpoſes, granted bond for themſelves, and their ſucceſſors in office, to pay L. 100 Scots of ſalary to the maſter of the grammar-ſchool, provided that he ſhould be admitted with conſent of the Queen and her ſucceſſors in the lordſhip of Dunfermline, or of the heritable bailie thereof.

Mr George Brown was admitted by the magiſtrates in 1748, with conſent of the Marquis of Tweedale, heritable bailie: and, by contract with the magiſtrates, accepted of L. 140 Scots, as his ſalary; including the L. 100 Scots, payable out of the mortification, with L. 40 more, revocable by the magiſtrates at pleaſure.

No ſalary having been ſettled by the heritors, Mr Brown applied to the preſbytery, who ſuſtained themſelves competent, under the ſtatute 1633. c. 5. as having come in place of the biſhop, and found, that the mortification is no part of the legal proviſion for the ſchoolmaſter, and modified 200 merks, including the L. 40 ſettled by the town, as the legal ſalary of the ſchoolmaſter, in all time coming, and appointed the heritors to ſtent themſelves, conform to their valued rent, for the remainder of the 200 merks.

The heritors brought an advocation, and pleaded, that the ſentence of the preſbytery was null and void. Every thing reſpecting the ſettling of ſchools is regulated by the act 1696. c. 26. by which the preſbytery have no other power in that matter, but to call a meeting of the heritors, and, in default of ſuch meeting, to apply to the commiſſioners of ſupply, to modify a ſalary, not under 100, nor above 200 merks, and to aſſeſs the lands in the pariſh proportionally. Indeed, the act gives no power whatever to the preſbytery, in a caſe like the preſent, where a ſchoolmaſter is already ſettled, with a ſalary conſiderably above the maximum.

'The Lords found, that the preſbytery has no juriſdiction in this mat-
'ter, and therefore advocated the cauſe, and aſſoilzied.'

G. F.

Act. *Macqueen.* Alt. *Sollicitor Dundas.* Reporter, *Pitſour.*

No. LXXV.

No. LXXV. *July* 29. 1768.

HENRIETTA SINCLAIR, and BENJAMIN MOODIE of Melſetter her Huſband;

Againſt

CHARLES SINCLAIR of Olrick.

L E G I T I M.

Effect of a Diſcharge in a Contract of Marriage upon the Wife's Right of Legitim or Claim upon her Father's Executry.

DONALD SINCLAIR of Olrick had one ſon, Charles Sinclair, and one daughter, Henrietta, who, in 1755, married Mr Moodie of Melſetter; and, by the contract of marriage, the eſtate of Melſetter was ſettled upon the iſſue of the marriage; and, on the other part, Olrick gave a portion of L. 500 Sterling with his daughter, which ſum, by the contract, 'ſhe, with conſent of her ſaid future huſband, and he, as 'taking burden upon him for her, accepts of, in full ſatisfaction to her, 'of all ſhe can aſk or demand as portion-natural, legitim, or upon any 'other account whatever, excepting good-will allenarly.'

In 1766, Donald Sinclair died, and his ſon and heir Charles *contended*, That, by the above recited clauſe in Mrs Moodie's contract of marriage, ſhe was cut off from every claim upon her father Olrick's executry. It was, on the other hand, inſiſted for Mrs Moodie and her huſband, that ſaid clauſe did not exclude her from her father's executry, or cut off her legitim; and ſhe obtained herſelf decerned executrix *qua* neareſt in kin to her father, before the commiſſory of Caithneſs, and brought an action againſt her brother Charles, as intromitter with his father's moveable effects. Charles raiſed a reduction of the confirmation obtained by Mrs Moodie. The Lord Auchinleck Ordinary reported the queſtion to the court.

And, on adviſing the cauſe, 16th June 1768, 'The Lords found, 'that the purſuer Henrietta Sinclair is not excluded from her father's 'executry by the diſcharge in her contract of marriage, but has right 'thereto by the confirmation produced; aſſoilzie her and her huſband 'from the proceſs of reduction and declarator brought againſt them by 'Charles Sinclair, and decern therein accordingly; and remit to the 'Lord Ordinary to proceed in the cauſe.'

Charles Sinclair reclaimed againſt this interlocutor; and, on adviſing his petition, with anſwers for Mrs Moodie, 29th July 1768, 'The 'Lords adhered to their former interlocutor, finding, that Henrietta 'Sinclair is not excluded from her father's executry by the diſcharge in 'her contract of marriage, but has right thereto by the confirmation 'produced, and aſſoilzie her from the proceſs of reduction; and in as 'far refuſe the deſire of this petition; but find the petitioner Charles 'Sinclair is intitled to the legitim, and to heirſhip-moveables; and remit 'to the Lord Ordinary to proceed accordingly.'

Pleaded,

Pleaded, in a reclaiming petition for Mrs Moodie, againſt this laſt interlocutor: By the law of Scotland, children are intitled to a portion of their father's moveable eſtate at his death, of which he cannot fraudulently diſappoint them. This *legitim* or legal ſhare, by the civil law, extended to heritage as well as moveables, though, by our law, it is confined to moveables. The heir is excluded from the legitim, being conſidered as drawing his *pars legitima* by ſucceeding to the heritable eſtate; and the ſingle exception to this general rule is, that, where the heir finds the heritable eſtate of leſs value than a rateable ſhare of the whole eſtate, heritable and moveable together, he may collate or throw the whole into one common ſtock, and draw his ſhare along with the other children.

This legal portion, or legitim, is a *jus crediti* in the perſons of the younger children who ſurvive their father, and will tranſmit to their repreſentatives without confirmation; and, where one or more of the younger children diſcharge or renounce their legitim during the father's life, thoſe who renounce are conſidered as if they had predeceaſed the father, and their right will accreſce to the other children intitled to the legitim; and, if the father ſhall, in his lifetime, obtain diſcharges from all the children intitled to the legitim, it is thereby extinguiſhed, and the whole executry becomes dead's part; and where, in ſuch caſe, the father leaves no wife, and all the children but the heir have renounced their legitim, the queſtion comes to be, Whether ſuch renunciation of the other children ſhall be underſtood to increaſe the dead's part? or ſhall it operate in favour of the heir, ſo as to transfer the legitim to him? And it is thought that, while any of the younger children are alive, the heir cannot be intitled to reap any benefit from theſe renunciations, as, *proprio jure*, the heir has right to no ſhare of the legitim. And, by his acceptance of the land-eſtate as his legal portion, he is excluded from any ſhare of the moveables, ſo long as there is any child or children of the father exiſting; for, though the renunciations of the younger children may extinguiſh their claim of legitim in favour of their father, it cannot create a right in the heir which otherwiſe had no exiſtence. And it is nowiſe inconſiſtent with this doctrine, that the heir, where he is the only child, has right to the legitim, as, in that caſe, he is the only perſon who can diſcharge the obligation incumbent on the father; whereas, where there are younger children, their diſcharges may extinguiſh that right, ſo as to liberate the father, without giving any right to the heir, in a queſtion with whom their right will ſtill be good, as he, by law, is intitled to no legitim while there is, at the father's death, a younger child exiſting. And, in ſupport of this plea, ſeveral authorities and deciſions were referred to.

Anſwered for Charles Sinclair: Mrs Moodie's whole argument proceeds upon the ſuppoſal that the heir *proprio jure*, has no right to the legitim, which is not the caſe. It may be true, that, where there is an eldeſt ſon, and younger children unforisfamiliate, the heir has no title to demand any ſhare of the moveable eſtate, unleſs he collate; but this clearly ſhows that, where there was no heritable eſtate, the eldeſt ſon has a right to the legitim, along with the other children. And the law, by giving the heir an option, in caſes where there was an heritable eſtate, either

either to come in along with the other children, or take the heritable eſtate, gives the heir an indulgence; but, by no means, ſhows that he has, *proprio jure*, no right to the legitim. By the civil law, the right of the whole children to their legitim was upon the ſame footing; there was no diſtinction between one and the reſt; the right belonged to the whole children *proprio jure*; and the principles of the civil law, in this point, have been adopted into ours. Where there is, of a marriage, but one child, a ſon, and univerſal heir, he is intitled to the legitim, and his father can no more exclude him from that right than he could younger children; and, in a diviſion of the moveable eſtate with the relict, he will draw, without collation, the legitim, in the ſame manner younger children would have done, which could not be the caſe, if the doctrine pleaded by Mrs Moodie was well founded; becauſe, as her right of legitim was extinguiſhed by her diſcharge, ſhe muſt maintain, that, in no caſe whatever, has an eldeſt ſon, who ſucceeds to an heritable eſtate, any right to legitim; yet, the contrary of that is clear, from an only ſon and heir being intitled to the legitim, in a queſtion with the relict. And the deciſions of the court have been agreeable to theſe principles, the caſe of Martin *contra* Agnew in February 1749 excepted, which, being a ſingle deciſion, and contrary to the whole train of the judgments of the court, ought not to be followed; as, upon attending to the riſe of this right of legitim, and ſenſe in which it has been underſtood, it is plain, that, where younger children, in conſequence of a proper conſideration from the father, diſcharge their right of legitim, their right accreſces to the heir.

'The Lords adhered.'

A. E.

For Mrs Moodie, *Jo. Swinton, jun. and David Rae.*
For Charles Sinclair, *Lockhart, and David Armſtrong.*

No. LXXVI. *Auguſt* 5. 1768.

DUKE of BUCCLEUGH;

Againſt

The OFFICERS of STATE.

PRESCRIPTION

Of an erroneous Tenure of Lands.

WALTER Earl of Buccleugh purchaſed the barony of Ewiſdale from Sir John Ker, who became bound to infeft him, either *de me*, for a feu-duty of 160 merks, or *a me*. The Earl was infeft baſe, and got a perpetual diſcharge of the feu-duty.

Anne Counteſs of Buccleugh, in her contract of marriage with the Duke of Monmouth, granted procuratory for reſigning her lands in terms of the contract; and a charter was thereon expede, under the great ſeal, comprehending the barony of Ewiſdale, as if holding feu of the crown for payment of 160 merks, though the Counteſs was not crown-vaſſal in that barony.

The feu-duty never had been exacted, nor entered in the property-rolls in exchequer. At length, in 1760, the Barons made an order that the Duke ſhould be charged with the feu-duties, for 40 years back, and in time coming.

The Duke brought an action in the court of ſeſſion, to have it found and declared, that, as the barony of Ewiſdale was formerly held ward of the crown; ſo he was now intitled to hold it blanch, and to have all ſubſequent charters and retours expede in thoſe terms.

Pleaded for the purſuer: As the barony of Ewiſdale was held ward of the crown by Sir John Ker, and feu of him by the Earl of Buccleugh, ſo there was no change of the holding from ward to feu in any of the charters; and it muſt have been by miſtake that the charter in favour of the Counteſs was conceived, as if the barony had been held feu of the crown; eſpecially as, in that ſame charter, there is an expreſs clauſe changing the holding of other parts of the eſtate from ward to blanch.

Nor is there room for preſcription in this caſe. No feu-duties have ever been received by the crown; and the Duke cannot be ſaid to have acquired, by preſcription, the mode of holding which the officers of the crown contend for, or be obliged to plead preſcription againſt his will. Indeed, there are not *termini habiles* for preſcription in favour of the crown; ſince, when the miſtake firſt happened, and for many years after, the crown had no intereſt to plead it, ward being a more beneficial tenure than feu.

Anſwered: There is no ſufficient evidence that the Counteſs did not eſtabliſh a right to the procuratory in Sir John Ker's diſpoſition, whereby her reſignation of the barony of Ewiſdale would have been effectual at the time; and there is the ſtronger reaſon to believe that her titles were properly adjuſted, that, as appears from the preface of Forbes's Journal, p. 32. Sir John Gilmour, preſident of the ſeſſion, was called up to London upon occaſion of the Duke of Monmouth's contract of marriage.

Be that as it will, upon the ſuppoſition that the ſtatute for aboliſhing ward-holdings had never paſſed, ſo that it would have been for the advantage of the purſuer to hold feu, rather than ward, the renewals of the inveſtiture granted by the crown, would have defended him againſt any action which might have been brought to compel him to hold ward. And theſe renewals, which are ſo many repeated acts of poſſeſſion on the part of the crown, muſt be equally ſufficient to eſtabliſh that mode of holding which is moſt beneficial to the crown, in virtue of the ſtatute introducing the poſitive preſcription, which is no leſs available to the ſuperior than to the vaſſal. Indeed, the Duke is barred by the negative preſcription, ſince he or his anceſtors might have brought an action for correcting the miſtake ſuppoſed to have been committed in the inveſtitures.

'The

'The Lords found, that the purſuer is not intitled to demand a charter 'from the crown of the barony of Ewiſdale holding blanch.'

G. F.

Act. *Lockhart*. *Ilay Campbell*.
Reporter, *Auchinleck*.

Alt. *Montgomery* Advocatus.

No. LXXVII. *Auguſt* 5. 1768.

K E R;

Againſt

K E R.

BILL OF EXCHANGE.

Action refuſed on a proteſted bill.

ACTION was refuſed on a bill for 3000 merks, which had been proteſted immediately upon becoming due, but was allowed to lie over for about 20 years, when, after the death of both drawer and accepter, an action was brought upon it, by the ſon of the drawer, recently after he had been decerned in payment of certain ſums due by him to the ſon of the accepter.

Other preſumptions concurred in this caſe, particularly a clearance between the drawer of the bill himſelf, and the ſon of the accepter, and another clearance with the drawer's ſon, after his father's death, in neither of which the bill was mentioned.

G. F

Act. *Ilay Campbell*. Alt. *W. Wallace*. Reporter, *Gardenſton*.

No. LXXVIII. *November* 16. 1768.

JAMES, ANDREW, and KATHARINE WEMYSS's, younger children of the deceaſed JAMES WEMYSS, and ELIZABETH TOD, his relict;

Againſt

DAVID WEMYSS, eldeſt ſon of ſaid JAMES WEMYSS.

Whether a contract of marriage binding, when not ſubſcribed by the wife?

IN 1730, James Wemyſs, tenant in Bogie, intermarried with Elizabeth Tod, daughter of James Tod, tenant in Gelſtane. The contract of marriage proceeds upon the recital of its being 'concorded, agreed, and matrimonially contracted between the parties following, viz. 'James Wemyſs, tenant in Bogie, on the one part, and Elizabeth Tod, 'lawful daughter to James Tod, tenant in Gelſtane, with the ſpecial advice and conſent of her ſaid father, and the ſaid James Tod, as taking 'full burden in and upon him for his ſaid daughter, on the other part.'

By this contract, James Wemyſs binds and obliges himſelf to have in readineſs, of his own proper means, the ſum of 2000 merks, which, with the farther ſum of 1000 merks of tocher, received with his ſaid ſpouſe, he obliges himſelf to employ on land or good ſecurity, and to take the rights and ſecurities thereof to himſelf, and Elizabeth Tod, his promiſed ſpouſe, and the longeſt liver of them two, in conjunct fee and liferent, and the heirs and bairns to be procreated of the marriage, in fee; and whatever lands, goods, and gear, ſhould happen to be conqueſt and acquired during the marriage, James Wemyſs bound himſelf to provide and ſecure the ſame to himſelf, in liferent, and to the bairns of the marriage, in fee; he farther obliged himſelf, his heirs, &c. in caſe of his wife's ſurviving him, to pay her 1000 merks, at the firſt term of Whitſunday or Martinmas after the diſſolution of the marriage, and an yearly annualrent, correſponding to the principal ſum of 500 merks, with the half of the houſhold pleniſhing, if no children, and one third thereof, in caſe of children. On the other part, James Tod, the bride's father, binds himſelf, his heirs, &c. to pay to James Wemyſs, 1000 merks of tocher.

This contract was ſigned by James Wemyſs, the huſband, and by James Tod, the bride's father, but not by Elizabeth Tod.

In 1766, the marriage diſſolved, by the death of James Wemyſs, the huſband, when there exiſted David the eldeſt ſon, and a number of younger children. During the ſtanding of the marriage, James Wemyſs purchaſed the lands of Lathallen, the rights of which he took to himſelf,

in

in liferent, and David, his eldeſt ſon, in fee. He left beſides a conſiderable ſum in money, a good deal of moveable effects, and the tack of the lands of Caſſingray, for a conſiderable number of years to run, and for which a graſſum had been paid.

James Wemyſs made no ſettlement of his affairs; and, ſoon after his death, the widow, and ſome of the younger children, brought an action againſt David, the eldeſt ſon, who had intromitted with the effects.

Elizabeth Tod, the widow, inſiſted, that, as ſhe had not ſigned the contract of marriage, ſhe could not be bound thereby, and was intitled to a terce of the lands of Lathallen, and a third of the moveables.

The younger children founded on the proviſion in the contract of marriage, by which James Wemyſs was bound to ſecure the heirs and bairns of the marriage, in the ſum of 3000 merks, and alſo the haill conqueſt; during the ſtanding of the marriage.

It was, on the other hand, *contended* for David, the eldeſt ſon, that, ſuppoſing the contract of marriage not binding, the widow could not claim a terce out of the lands of Lathallen, the diſpoſition to theſe lands being taken to him in fee, and his father only in liferent.

And to the claim of the younger children, he *anſwered*, that the marriage-contract never having been ſigned by the wife, it was an incomplete deed, and not binding on any of the parties contracting; and, therefore, the ſucceſſion fell to be regulated in the ſame manner, as if the marriage-contract had never been executed.

The Lord Ordinary found, 'That James Wemyſs's contract of marriage not being ſigned by the wife, is an incomplete deed, not binding upon any of the parties; and therefore, that the wife and children of the ſaid James Wemyſs can only claim their legal proviſions: That the widow is intitled to a terce of the lands of Lathallen, purchaſed by him, and to a third of the free moveables, belonging to the defunct, at the time of his death: That the younger children, who are parties in this proceſs, have a right to their proportional ſhare of two thirds of the defunct's free moveables.'

The eldeſt ſon and younger children ſeverally reclaimed to the court againſt the Lord Ordinary's interlocutor.

Pleaded for David Wemyſs, the eldeſt ſon: The rule of law is, that a widow has right only to a terce of the lands in which her huſband died infeft; ſo is laid down by our lawyers, and eſtabliſhed by the judgments of the court; Carruthers, 29th January 1706. And there is but one exception to this rule, that is, if the huſband fraudulently abſtains from taking infeftment, merely to diſappoint his wife's claim, in ſuch caſe, the law will hold him infeft. In the preſent caſe, the huſband never was infeft, nor is there any reaſon to ſuſpect, that he meant any injuſtice to his wife.

Anſwered for the widow: The ſpirit of the law is, that a widow ſhall have a terce of the lands of which her huſband died proprietor, whether infeft or not. In this caſe, though the ſon is infeft in fee, the liferent is reſerved to the huſband, with power to alter the deed, or burden the ſubject; and, in ſupport of this doctrine, ſundry authorities were referred to.

Pleaded for the younger children, againſt the Lord Ordinary's interlocutor : Where there are but two parties to a contract, if the contract is not executed by both, it cannot conſtitute an obligation upon either. The eſſence of every contract is the *duorum vel plurium in idem placitum conſenſus*, ſo that, if either do not concur in executing, the contract can bind neither. But, if there are three or more parties to a contract, who are all reciprocally, but ſeparately bound to one another, the contract, though incomplete between two of the parties, will ſtill ſubſiſt as to the others. In this caſe, James Tod, the father of the bride, became bound to pay 1000 merks of tocher with his daughter, and this obligation he fulfilled, by paying the 1000 merks ; ſo that, *quoad* him, the contract received full implement ; and, after receiving this payment, the huſband could not refuſe implement of what was preſtable upon his part, to James Tod, for behoof of the children of the marriage for whom he contracted. The obligation to the children is not connected with that to the wife ; and ſhe, by neglecting or refuſing to ſign the contract, cannot defeat the children's claim in this caſe, where the huſband has received payment of the portion from the father, who was the party contracting for behoof of the children.

Anſwered for David, the eldeſt ſon : Mutual contracts muſt be good to all parties, or neither can be bound. And this principle has been carried ſo far, that, where the contract was duly executed, and both parties fixed, if one of them becomes unable to perform, the other will be free, and the contract at an end. In this caſe, the contracting parties are, the huſband on the one ſide, and the wife, with conſent of her father, on the other ; the wife is the principal contracting party, and not having ſigned the contract, is not bound ; the conſequence of which muſt be, the contract muſt fall to the ground. Where there are three or more ſeparately bound, in one contract, to each other, and the one cannot qualify any intereſt that he has in another's ſigning, who has not done ſo, it may be true, that the contract, as to thoſe that ſigned, would ſubſiſt, becauſe there the obligations fall to be conſidered, not as one mutual contract, but as ſeparate diſtinct agreements, though contained in one writing ; but, if the parties ſigning can qualify an intereſt in the perſon's ſigning, who refuſes to perform, the contract muſt fall as to the whole. If, in this caſe, the huſband could qualify no intereſt in the wife's ſubſcribing, it might afford ſome handle for the other party's plea ; but, it is evident, the huſband had a direct intereſt in the wife's ſigning. Where the huſband ſettles the conqueſt on the children of the marriage, and the wife gives up her legal claims of terce and *jus relictæ*, it muſt be underſtood, that the wife's giving up her legal claims, was the inductive cauſe of ſettling the conqueſt on the children ; and, therefore, if ſhe refuſe to ſign the contract, the huſband, or his heir, cannot be bound to implement the obligations he came under, in the belief that the wife was to accept of the conventional proviſions ſtipulated by the contract, in place of her legal claims.

The following interlocutor was pronounced on both petitions, when adviſed, with anſwers.

' The Lords find the contract of marriage betwixt James Wemyſs
' and Elizabeth Tod, in reſpect of the ſubſequent marriage betwixt
' them,

'them, ſubſiſting and obligatory upon all parties, viz. upon David 'Wemyſs, upon the widow, and upon the younger children:'

And refuſed, without anſwers, a petition for the widow, and another for David, the eldeſt ſon, reclaiming againſt ſaid interlocutor.

A. E.

For David, *Macqueen and Ilay Campbell.* For the Widow, *Alexander Bruce.*
For the younger children, *Lockhart.*

No. LXXIX. *November* 17. 1768.

GAVIN;

Againſt

KIPPEN & Co. and others.

BILL OF EXCHANGE.

Effect of a Proteſt for not-acceptance.

MESSRS Dunlops of Rotterdam, having ſold the ſhip Dorothy to the Whale-fiſhing company of Borrowſtonneſs, at the price of L. 2100 Sterling, drew bills for L. 400, on John Campbell, one of the partners, payable to David Gavin, to be placed to accompt of the Dorothy.

For Campbell's reimburſement, the Meſſrs Dunlops gave him an order on the company, who afterwards obliged themſelves to make payment to him.

Mr Gavin proteſted the bills for not acceptance; and Meſſrs Dunlops having failed, arreſtments were uſed, by Kippen & Co. and others, in the hands of the Whale-fiſhing company.

In a competition, 'the Lords preferred Mr Gavin,' upon the principles eſtabliſhed in the caſe, 27th November 1734, Mitchell *contra* Mitchel, where it was found, that a proteſt for not-acceptance was equivalent to the intimation of an aſſignation.

It was *argued* for Kippen and Co.: That, as the bills were drawn upon Campbell, and proteſted againſt him, there was no intimation to the Whale-fiſhing company. But it was *anſwered*, That, after the obligation granted to Campbell, the price fell to be conſidered as in his hands, and was effectually aſſigned to Mr Gavin by the bills drawn upon Campbell, and proteſted before the date of the arreſtments.

G. F.

Act. *Wight.* Alt. *Lockhart.*

No. LXXX.

No. LXXX. *November* 18. 1768.

MAGISTRATES of Glaſgow;

Againſt

M'DOWAL.

COMMUNITY.

If Magiſtrates can ſell a Superiority belonging to the Borough?

IN 1668, the magiſtrates of Glaſgow, for behoof of the community, purchaſed the lands of Provan, which were annexed to the common good by charter, ratified in parliament.

The lands having been feued out from time to time, the ſuperiority was ſold to William M'Dowal of Caſtleſempill, who ſuſpended the charge for the price, upon the ground that the magiſtrates could not give him a ſufficient progreſs, being tied up from alienating any part of the common good.

Pleaded for the ſuſpender: Magiſtrates of boroughs are merely adminiſtrators for the community; and, ſo far from being at liberty to alienate, they are laid under reſtrictions, with regard to their adminiſtration of the annual revenue, as appears from *Iter Camerarii*, cap. 39. § 17. 18. and many acts of parliament, as 1491. c. 36. 1535. c. 26. 1587. c. 113. 1593. c. 185. 1693. c. 28.

No example appears of actions brought againſt magiſtrates for direct alienations of the common good of the borough, which ſeems not to have been attempted till now. But actions have been brought againſt them for ſmaller acts of mal-adminiſtration, as granting feus, and giving leaſes for a longer ſpace than three years; for attempting to impoſe burdens on the community, as in the caſe, 6th January 1681, Town of Wigton *contra* Town of Stranrawer; for diſcharging bonds belonging to it, as 3d March 1685, Magiſtrates of Glaſgow *contra* Barns, obſerved by Harcarſe, *v. Magiſtrates.*

Anſwered: The alienation of a ſuperiority, an unimproveable ſubject, is a beneficial act of adminiſtration; and, even in the days of Balfour, the benefit of the borough was the criterion for determining whether the alienation was lawful or not; Pract. p. 45. c. 14. *in fine.* Indeed, the lands now in queſtion were no part of the original common good of the borough, to which only the antient acts of parliament ſeem to apply.

But theſe acts of parliament are now in deſuetude. Tacks of the common good of boroughs are daily granted for a longer term than three

three years, and theſe tacks are effectual in law, when they are beneficial to the community. This appears from ſundry deciſions, as 1ſt February 1698, Paterſon *contra* Magiſtrates of Edinburgh; 30th June 1752, Anderſon *contra* Magiſtrates of Renfrew; 3d July 1752, Dean *contra* Magiſtrates of Irvine. In the late caſe of Heriot's hoſpital, not only were feus ſuſtained which had been granted by the governors, but even alienations of the feu-duties.

As, therefore, magiſtrates have been ſupported in granting tacks, and even feus, where they appeared to be beneficial to the borough, it follows that the alienation of a ſuperiority muſt be equally effectual; and no example can be pointed out where the contrary was decided.

'The Lords found, that the lands, purchaſed by the magiſtrates of 'Glaſgow in 1668, were alienable by their ſucceſſors in office; and, 'therefore, repelled the reaſons of ſuſpenſion.'

G. F.

Act. *Ilay Campbell.* Alt. *Alex. Bruce.* Reporter, *Juſtice-clerk.*

No. LXXXI. *February* 2. 1769.

MAGISTRATES of INVERNESS;

Againſt

DUFF and others.

SUPERIOR AND VASSAL.

Clauſe for doubling the feu-duty on the entry cujuſlibet heredis vel aſſignati.

THE magiſtrates of Inverneſs had granted feus of certain lands and fiſhings, belonging to the borough, in favour of the original vaſſals, and their heirs and aſſigns whatſoever, with a clauſe of reddendo in theſe words.

'Reddendo inde annuatim prefatus , heredes ſui et aſſigna-'ti antedicti nobis, noſtriſque ſucceſſoribus, ſummam 13 ſolid. et 4 de-'nar. monetae Scotiae ex unaquaque dicta acra, ad duos anni terminos, 'nec non duplicando dictam feudifirmam primo anno introitus cujuſli-'bet heredis aut aſſignati ad dictas terras, aliaque praeſcripta, prout uſus 'eſt feudifirmae duplicatae, pro omni alio onere,' &c.

Theſe feus having come into the perſons of ſingular ſucceſſors, a declarator of non-entry was purſued by the magiſtrates, in which the queſtion aroſe, Whether the defenders were liable in a year's rent for their

entry, or if they were intitled to be entered for payment of double the feu-duty, in terms of the above clauſe.

Pleaded for the defenders: Whatever may be the rule of law, as to the extent of the compoſition payable by ſingular ſucceſſors, it is lawful for the ſuperior to reſtrict it by voluntary agreement. And, in this caſe, the compoſition is plainly reſtricted to the duplicando of the feu-duty. The feus are granted *heredibus et aſſignatis quibuſcunque.* Under this clauſe, the magiſtrates may be compelled to receive all ſingular ſucceſſors of the vaſſals, voluntary or legal. And, if the term *aſſignati* be underſtood in that ſenſe, in one part of the charter, it cannot receive a different explanation in another part of it.

Neither can it be confined to aſſignees before infeftment. Craig informs us, that recognition cannot take place in fees taken to aſſignees, III. 3. 31.; which ſeems to exclude ſo limited a conſtruction. Indeed the terms of the reddendo itſelf, are excluſive of it in the preſent caſe. The duplicando of the feu-duty is declared to be payable at the entry *cujuſlibet heredis aut aſſignati*, which muſt of neceſſity apply to entries *after* infeftment; for, before infeftment, no compoſition can be due, ſeeing the ſingular ſucceſſor may infeft himſelf upon the unexecuted precept in the feu-charter.

Anſwered: By the principles of the feudal law, the ſuperior could not be obliged to receive ſingular ſucceſſors, unleſs there was an expreſs clauſe in the grant for that purpoſe; and ſuch clauſes were always qualified by the condition of paying a compoſition to the ſuperior. Afterwards, when, by ſtatute 1469, c. 36. the ſuperior was obliged to receive adjudgers, the compoſition was fixed at a year's rent; and the right to this compoſition is reſerved in the ſtatute of wardholdings, which extends the privilege to all ſingular ſucceſſors.

This right may no doubt be renounced by the ſuperior; but, being ſo firmly eſtabliſhed in law, renunciation of it will not be preſumed from a ſingle inaccurate expreſſion in a charter, ſuch as occurs in the preſent caſe. Indeed it would appear, that the addition of *aſſignati* was made without meaning. The duplicando is declared to be payable at the entry of heirs and aſſigns, *prout uſus eſt feudifirmae duplicatae*; though nothing can be more certain, than that the entering a ſingular ſucceſſor for double the feu-duty, is directly contrary to practice, and no inſtance can be pointed out where any ſingular ſucceſſor, even in theſe feus, was received upon ſuch terms.

The expreſſion *aſſignati*, therefore, can have no meaning in the charters, unleſs it is underſtood of aſſignees before infeftment. And ſo, Lord Stair informs us it has frequently been interpreted, II. 4. 32.; and Lord Bankton, II. 4. 34. Indeed the point was expreſsly determined, 5th February 1663, Lady Carnegie *contra* Lord Cranburn; and 29th January 1673, Ogilvie *contra* Kinloch. Nor is this doctrine contrary to what is laid down by Craig, in the paſſage referred to; for, though aſſignees are ſingular ſucceſſors, yet all ſingular ſucceſſors are not aſſignees; on the contrary, aſſignation is properly applicable to perſonal, not to real rights.

'The

' The Lords found the defenders liable to the town of Inverneſs, for ' a full year's rent, upon getting an entry from the town.'

G. F.

Act. *Lockhart.* - Alt. *Rae, Coſmo Gordon, Montgomery* Advocatus.

No. LXXXII. *February* 3. 1769.

LEITCH;

Againſt

SWAN.

IRRITANCY,

Not incurred by neglecting the Order of Redemption in a Decree of Declarator.

JAMES LEITCH diſponed his lands of Ardoch to Henry Swan, who granted a back-bond, declaring them redeemable for payment of a certain ſum; but, under condition, that, unleſs the money was paid on or before Martinmas 1763, or conſigned at the pariſh church of Kilwinning, in the hands of a reſponſal perſon, upon 40 days lawful premonition, the back-bond ſhould be null, and the lands irredeemable.

Upon the term-day of Martinmas 1763, after Henry Swan's death, Leitch required a renunciation of the wadſet, upon a tender of a bill bearing to be accepted by Henry Swan, and of the balance in money.

This tender was refuſed, and an action brought by the tutors of Swan's ſon, an infant, for reducing the bill as forged, and declaring the irritancy to have been incurred.

The bill was declared to be vitiated and improbative, and the Lord Ordinary pronounced an interlocutor, whereby he found the lands ſtill redeemable: ' But, in caſe the defender ſhall not, 60 days preceeding ' the term of Martinmas 1767 years, intimate to the purſuer and his ' tutors, in preſence of a notary and witneſſes, his intention to redeem, ' and, in caſe he ſhall not, on the ſaid term of Martinmas 1767, be- ' tween the hours of 12 at noon, and 1 afternoon, conſign, in the bank ' of Scotland, the principal ſum and annualrents due thereon, Found ' the lands, from and after the ſaid term of Martinmas 1767, ſhall be- ' long in property to the purſuer, and be irredeemable.'

Leitch neglected to make the premonition required by the interlocutor; but, a few days before Martinmas 1767, informed the tutors by letter,

ter, that he intended to redeem the lands on the term-day, when he accordingly tendered the money; and, upon their refuſal, conſigned it in the bank of Scotland, in December following, and brought a proceſs of declarator of redemption.

Pleaded in defence: The purſue did not obtemper the order of redemption preſcribed in the interlocutor. And though, from equity, the court is in uſe to allow penal irritancies to be purged, at any time before declarator, or the lapſe of the long preſcription; yet, there is no example of admitting a power of redemption, after decree of declarator has been pronounced. There is no longer any room for equity; and, were the reverſer again indulged in a power to redeem, declarators of irritancy never could be brought to a concluſion; there would ſtill be the ſame claim for a new indulgence as before.

Anſwered: The order of redemption pointed out in the interlocutor, and the irritancy adjected to it, cannot have greater force than a conventional irritancy ſtipulated by the parties. And, whatever may have been the rigour of the antient law, it is now eſtabliſhed in practice, that there is no neceſſity of obſerving the ſpecific terms of the order of redemption, but that it may be ſupplied by equivalents. The intimation by letter was as effectual a notification as a formal premonition under form of inſtrument; and muſt, at any rate, be ſuſtained to the effect of ſaving againſt a penal irritancy.

'The Lords found, that the lands are ſtill redeemable; and found the 'defender liable in expences of proceſs.'

G. F.

Act. *Rae, G. Buchan-Hepburn.* Alt. *Crosbie, Geo. Fergusſon.*
Reporter, *Monboddo.*

No. LXXXIII. *February* 5. 1769.

G I B;

Againſt

G I B.

D I L I G E N C E,

Preſtable by tutors.

A TUTOR, who took up an heritable bond belonging to his pupil, upon account of the irregular payment of the intereſt, and put the money into the hands of bankers, who were in good credit at the time,

time, but ſuddenly ſtopped payment a few months after the tranſaction, and, after the expiry of the tutory, was purſued to make up the loſs.

The purſuer referred to many authorities, for proving, that the exacteſt diligence was preſtable by tutors, as § 1. *Inſt. de Oblig. quae quaſi ex contract.* *L.* 21. *C. Mandati, L.* 37. § 1. *D. de Neg. geſt. Voet. ad tit. de Adminiſtr. tut. num.* 6.

On the other hand, the defender contended, that the authorities did not apply, and that tutors were not liable for the unexpected failure of debtors who had been in good credit. In proof of this propoſition, he referred to *L.* 50. *de Admin. et per. tut. et cur. L.* III. *D. de Cond. et dem. Sande dec. Fris. lib.* 2. *tit.* 9. *def.* 13. Bruce's Tutor's guide, part 3. tit. 3. § 37.

'The Lords found, that, as the bankers were carrying on buſineſs, 'and in good credit when the defender put the pupil's money into 'their hands, in February 1765, on their bill, payable one day af-'ter date, that their failing afterwards, and ſtopping payment in 'November thereafter, does not make the defender liable to the 'purſuer for the ſaid money.'

G. F.

Act. *Lockhart.* Alt. *Maclaurin.*

No. LXXXIV. *February* 8. 1769.

URQUHART of Cromarty;

Againſt

LORD ELIBANK.

ACTIO QUANTI MINORIS.

Alledged errors in a rental not relevant to diminiſh the price of lands ſold by roup, where the articles of roup contained a clauſe, bearing that the price was to have no reference to the rental.

MR URQUHART having reſolved to ſell his eſtate of Cromarty, advertiſed the ſame in the public news-papers, and cauſed make out a rental; but, to prevent diſputes, when the eſtate was expoſed to roup, there was inſerted in the articles of roup the following clauſe. 'The 'price put upon the ſaid lands and eſtate is not underſtood to have any 'reference to the rental; and therefore, the purchaſers and offerers muſt 'ſatisfy themſelves of the juſtneſs thereof, before the roup; and it is 'hereby expreſsly declared, that no objections againſt it ſhall be compe-'tent thereafter.'

At the roup, the eſtate was purchaſed in name of Lord Elibank, who afterwards paid up the price to about L. 1500, which he refuſed to pay, alledging, that the rent was not agreeable, in ſome particulars, to the rental exhibited. Mr Urquhart gave a charge for the remainder of the price, which Lord Elibank ſuſpended, and inſiſted for a deduction of the price.

Pleaded for Lord Elibank: The ſingle queſtion is, with regard to the relevancy of the demand of deduction claimed, or if ſuch claim is precluded by the above-mentioned clauſe in the articles of roup. Such clauſes are uſual in ſales, and the interpretation put upon them is, to prevent ſales being afterwards challenged upon ſmall involuntary miſtakes, or trivial inaccuracies; but never conſidered to protect againſt a challenge, or amendment of the tranſaction, if fraud ſhould be diſcovered, or even a defect, which, if known at the time, would have made a material difference in the tranſaction. In a ſale of lands, the rental muſt be taken upon the word of the ſeller, the purchaſer ſeldom having it in his power to know the real ſtate of a rental before purchaſe: That, though in caſes where there was nothing more but mere inequality between the price and the value of the ſubject ſold, where there was no impoſition on the part of the ſeller, or ignorance on the part of the purchaſer, the law gave no relief; yet caſes may be figured where the error is ſuch as will found a good claim, both in law and equity, for an abatement *pro tanto* of the price. And, in this caſe, the ſuſpender offered to prove his allegations of there being errors in the rental to ſuch extent as made a difference in the price of about L. 1500 Sterling, the balance yet due.

Anſwered for Mr Urquhart: The eſtate was neither expoſed nor purchaſed by a rental, but in the way of a ſlump bargain, whereby the purchaſer was to take the eſtate *tantum et tale* as it ſtood, without regard to a rental; it was optional to him to ſell it in what manner he thought proper, either by public roup, or private bargain, and equally competent to him to preſcribe the terms and conditions upon which the eſtate ſhould be expoſed to ſale, whether by rental, or by the lump. It has been found from experience, that in ſales by rentals, occaſion has often been taken to raiſe diſputes in paying the price, on pretence of ſhortcomings or errors in the rental, which made the charger reſolve to expoſe his eſtate by the lump; and, in that view, it was expreſsly conditioned in the articles of ſale, that the price was to have no reference to a rental. And, as it cannot be diſputed, that a proprietor may expoſe his eſtate by the lump, without reference to a rental, ſo there can be no doubt of that being the caſe here; the clauſe in the articles of roup being as clear and explicit to that purpoſe as can be well conceived. If, in this caſe, in tranſcribing the rental, any articles had been omitted, and the error not diſcovered till after the ſale, would the ſuſpender have been bound to pay an excreſcent price, purchaſing upon articles of ſale, ſuch as the preſent? It is thought he would not: And, if ſo, of conſequence he can claim no defalcation. And that being the caſe, it would be improper to involve the parties in the expence of an unneceſſary and irrelevant

irrelevant proof, although the charger by no means admits the ſuſpender's alledgeances to be well founded.

'The Lords found the letters orderly proceeded, with expences.'

A. E.

For Urquhart, *Lockhart and Alexander Elphinſton.* For Lord Elibank, *Sollicitor Dundas, and Ilay Campbell.*

No. LXXXV. *February* 10. 1769.

DUNDAS;

Againſt

DRUMMOND.

WARRANDICE.

Heir of one ſelling with Procuratory and Precept, If bound to enter with the Superior?

GEORGE DRUMMOND of Blair ſold to Thomas Dundas of Fingaſk, the lands of Quarrol, which he held blench of Charles Elphinſton of Cumbernauld; and granted diſpoſition containing procuratory and precept, clauſe of abſolute warrandice, &c.

Mr Dundas did not execute the procuratory, but took infeftment on the precept.

Upon Mr Drummond's death, Mr Elphinſton the ſuperior, purſued a declarator of non-entry againſt Mr Dundas, who brought an action againſt Mrs Drummond, as repreſenting her brother, concluding that ſhe ſhould be decerned to enter with the ſuperior, and againſt the ſuperior, to receive her.

Mrs Drummond, not chuſing to concur in diſappointing the ſuperior of his compoſition, allowed the defence to be carried on in her name; though it was agreed, that, if ſhe was found obliged to enter, it ſhould be at the expence of Mr Dundas, who would reap the benefit.

Pleaded for the purſuer: By granting a precept, as well as a procuratory, Mr Drummond put it in the power of Mr Dundas to hold the lands, either of the immediate or mediate ſuperior. Suppoſe the diſpoſition had not contained a procuratory, there can be no doubt that the diſponer and his heirs could have been compelled to enter with the ſuperior, and muſt have been liable upon the warrandice for every loſs ariſing from the neglect of it. Nor does it make any difference that a double mode of entry is mentioned; the very meaning of an alternative is, that the party ſhall have his option; and the right of option is one of the

the rights which the purſuer holds under the diſpoſition, and which Mr Drummond and his heirs are bound to warrant, as much as any other right conſequent upon it.

Anſwered: Had the purſuer's demand been underſtood to be founded in law, it muſt have been made in innumerable inſtances; and yet, this is the firſt example of an action of the kind being brought, which ſhows that it was never imagined, that the heir of a perſon, who had ſold with procuratory and precept, could be obliged to enter with the ſuperior.

And the view of the queſtion muſt not be confined to the preſent eaſy modes of holding, when the taking of an entry may not be attended with any ſevere conſequences. To diſcover the true principle, it ought to be conſidered how the caſe would have ſtood before the ſtatute of ward-holdings, when, in conſequence of the feudal caſualties, the vaſſal might have incurred burdens, to an amount greater perhaps than the value of the feu. It cannot be imagined that one, who ſold with procuratory and precept, reſerving no intereſt in the lands, could mean to continue ſubject to ſuch burdens. And, even as matters now ſtand, there is no reaſon to think that he intended to remain liable for the feu-duty, eſpecially when there is no clauſe in the diſpoſition for that purpoſe; or to oblige himſelf and his heirs to be at the expence of entries in all time coming, in order to protect the purchaſer from the compoſition, by keeping up the ſhadow of a ſuperiority, without any advantage to himſelf.

The clauſe of warrandice does not vary the argument. Warrandice is not incurred in conſequence of an eviction which happens by the fault of the purchaſer: So ſays Lord Stair, II. 3. 46. Nor is the ſeller bound to warrant againſt ſubſequent caſualties of ſuperiority, without an explicit obligation in the diſpoſition; Balf. Pract. p. 318. c. 5.

'The Lords found, that Mrs Drummond could not be obliged to enter 'with the ſuperior; and, therefore, aſſoilzied her from the action, 'and found expences due.'

G. F.

Act. *Sollicitor Dundas.* Alt. *Macqueen.*

No. LXXXVI.

No. LXXXVI. *February* 11. 1769.

CLARK, and others;

Againſt

HOPE.

COLLIERS

May be employed at any Coal poſſeſſed by their Maſter.

MR Archibald Hope, proprietor of the coal of Harrylaw, was leſſee of the coals of Edmonſtone, Monkton, and Woolmet, all belonging to different proprietors. And the queſtion came to trial, in an action at the inſtance of ſome of the colliers bound to theſe coals, Whether they could be compelled to work at a coal, different from that to which they were reſpectively bound? Or if, upon the work being ſtopped, they were intitled to an atteſtation of a reaſonable cauſe of removing, in terms of the act 1606. c. 11.?

Pleaded for the purſuer: Colliers are *adſcriptitii glebae*, bound to a particular coal; and, therefore, not transferable to another. So they are conſidered by Sir George Mackenzie. Obſ. 1606. c. 11. and by Bankton, I. 2. 82. When a collier conſents to become bound to a particular coal, he conſiders the circumſtances of it, its ſituation, its air, its eaſineſs in working; and he cannot, without injuſtice, be carried from a coal where he can earn large wages, with eaſe to himſelf, and ſafety to his health, to another coal, where leſs is to be earned, where, perhaps, there is ſcarce room to work, or where the air is peſtilential and noxious.

When the coal is wrought out, the collier is free; but, if he can be carried to a different coal, though belonging to a different proprietor, his bondage muſt be perpetual. And it makes no difference that Mr Hope is leſſee of all theſe coals. With reſpect to each of them, he muſt be conſidered as in the place of the different proprietors; and, as the proprietor of Edmonſtone could not ſend one of his colliers to work at the coal of Woolmet, ſo neither can the tackſman of both carry the colliers of the one to the coal of the other.

Anſwered: The ſituation of colliers is not to be determined by the ſtrict principles which apply to the *adſcriptitii glebae* of the Romans, or *homines proprii* of Germany. Colliers are bound to their *maſter*, and ſo they are conſidered in the ſtatutes 1606. c. 11. and 1661. c. 56. They are obliged to ſerve *him* in the work of coal, unleſs they can obtain a teſtimonial from him, or an atteſtation from a magiſtrate, that he has no work to give them.

The doctrine pleaded for the purſuers would go ſo far as to prove, that colliers could only be employed at the individual coal to which they entered; that they could not be carried to a different coal in the ſame eſtate; nay, that they could not even be carried to a different ſeam, in an edge coal, where there are great variations in the ſpace of a few yards.

But this doctrine has not been received by the court. On the contrary, in February 1762, the Marquis of Lothian, having purchaſed a coal, was found intitled to carry the colliers upon it to another coal belonging to him, at the diſtance of two miles. And a ſimilar judgment was pronounced in 1763, in a queſtion between Weemyſs of Cuttlehill, and ſome of his colliers.

As, therefore, the proprietor of a coal is intitled to remove his colliers to any coal where he has work for them, the tackſman muſt be in the ſame ſituation; and, during the courſe of his tack, have the ſame power over the colliers as the proprietor would have had, if he had kept the coal in his natural poſſeſſion.

'The Lords ſuſtained the defences, and aſſoilzied.'

G. F.

Act. *Maclaurin.* Alt. *Sollicitor Dundas.* Reporter, *Pitfour.*

No. LXXXVII. *February* 16. 1769.

CHALMERS;

Againſt

WILSON.

THIRLAGE.

Grounds turned into graſs.

AMONG ſundry articles of deduction pleaded by the tackſman of a mill, one was, that the proprietor having bought up many of the tacks upon the eſtate, kept great part of it in graſs, which was in tillage when the mill was ſet, whereby there was a ſhort-coming of the multures, in contemplation of which he had agreed to pay the rent.

Anſwered: The profits of a mill being caſual, the tenant is underſtood to run his riſk of a diminution, upon account of the chance of increaſe; and it has been decided, that the proprietor of a mill does not incur

incur the warrandice of the tack, in conſequence of the tenants throwing their grounds into graſs; July 1731, Moredfadzean *contra* Earl of Caſſillis.

'The Lords repelled the claim of deduction.'

G. F.

Act. *Rolland.* Alt. *Blair.*

No. LXXXVIII. *February* 16. 1769.

LOCH;

Againſt

HOME.

RECOMPENSE.

Ranſomer intitled to an allowance in ſolatium.

ALEXANDER HOME, a boy about 13 years of age, was put aboard a ſhip belonging to David Loch, deſtined for Carolina, and to touch at Madeira and Havannah. As this was his firſt voyage, he had no wages; on the contrary, he was to pay board for his maintenance.

The ſhip being taken by a French privateer, was ranſomed at L. 700, and Alexander Home given as ranſomer. But though, in the ranſom-contract, the ſhip had liberty to touch at Charleſtown and Havannah, ſhe was again taken, in that courſe, by a Spaniſh guarda-coſta, and carried into a Spaniſh port.

Alexander Home having made his eſcape on the coaſt of America, and returned to Scotland, brought an action againſt David Loch, on the ground, that the ranſom-contract was voided by his eſcape, which therefore was *in rem verſum* of Mr Loch; and concluding for L. 50, as his wages, from the date of the capture, till the day of his return to Scotland, with L. 200, as a *ſolatium* for the trouble and confinement he had ſuffered.

The judge-admiral decerned for L. 40 in full of all his claims; and David Loch brought a reduction of the decree.

Pleaded for the purſuer of the reduction: Though, in ordinary caſes, wages are due to a ranſomer, becauſe he would have earned them, had he remained in the ſhip, Alexander Home can have no claim on that head, ſince no wages were allowed him when aboard.

Neither

Neither has he any claim of recompenſe, as if the purſuer were *locupletior factus* by his eſcape. It is doubted, how far the eſcape of a ranſomer could operate a releaſe of the ranſom-money; and, in this caſe, the claim was extinguiſhed in a different way, by the ſecond capture made by the Spaniards, the allies of France, whereby the ranſom-contract was annulled.

Anſwered: In the caſe of captures, the ranſomer is not reſtricted to the wages of a ſailor; the practice is, that he makes a bargain with his Captain; and it is but reaſonable, that he ſhould have an allowance for the confinement which he ſuffers, beſides his maintenance during the detention, and the expences of his journey home.

Whatever claim the purſuer may have had againſt the Spaniards, he muſt have paid the ranſom to the French privateer in the firſt place, had the defender remained in their hands. He was bound to obtain the ranſomer's liberation, which could not be effected without payment, and could not be ſacrificed on pretence of any ſuch claim. Indeed that claim could ſcarce have been made effectual, unleſs the defender had eſcaped; ſo that the purſuer was *lucratus* in every view of the caſe.

'The Lords repelled the reaſons of reduction, and found the purſuer 'liable in the expences of proceſs.'

G. F.

Act. *Blair.* Alt. *Sinclair.*

No. LXXXIX. *February* 24. 1769.

WATSON;

Againſt

ORR and others, truſtees for the creditors of Patrick Tod.

BANKRUPT.

Truſtees of a perſon inſolvent preferred to arreſters.

A PERSON inſolvent, but not bankrupt in terms of the act 1696, diſponed his effects to truſtees for behoof of his whole creditors.

After the effects had been reduced into money by the truſtees, one of the creditors who had attended their meetings, but had never received any dividend, arreſted in the hands of the truſtees, and of ſome of the purchaſers from them, and purſued forthcoming.

'The

'The Lords preferred the truſtees, in reſpect the common debtor was 'not bankrupt in terms of the act 1696.'

G. F.

Act. *G. Buchan-Hepburn.* Alt. *Geo. Wallace.* Reporter, *Auchinleck.*

No. XC. *March* 1. 1769.

STANNERS;

Againſt

INGLIS.

PUBLIC OFFICER.

Clerk of the Bills, how far liable for Cautioners in Suſpenſions?

IN a ſuſpenſion of a charge for L. 8 : 8 : 0 Sterling, in which two perſons were bound as principals, and a third as cautioner, the clerk of the bills accepted as cautioner a journeyman ſhoe-maker, who, though not a houſeholder, appeared to be in a good way of bread for his ſituation in life.

The clerk did not conſult the charger, as to the ſufficiency of the cautioner; but it appeared he had taken out a copy of the bill.

Ultimate perſonal diligence was done againſt the original obligants, all of whom took the benefit of the act of grace. A poinding was likewiſe attempted againſt them, and againſt the cautioner in the ſuſpenſion; but the meſſenger returned an execution, bearing that they had not a pound's worth of effects among them.

Upon this the charger brought an action againſt Charles Inglis, deputy-clerk of the bills, upon the act of ſederunt, 27th December 1709, concluding for damages, for accepting of an inſufficient cautioner.

Pleaded in defence: As the clerk of the bills cannot be acquainted with all the cautioners who are offered to him from every corner of Scotland, his practice is to inquire at the agent for the charger, and to take no cautioner who is not approved of by him. And he conſtantly follows this rule, unleſs where a copy of the bill is taken out by the charger, in which caſe, he thinks himſelf ſafe to take any cautioner, who is habit and repute good for the money, if he be not put upon his guard, by a caveat lodged at the bill-chamber. The cautioner in this caſe, an induſtrious tradeſman, was believed to be abundantly ſufficient, eſpecially as there was reaſon to ſuppoſe, that the ſuſpenders themſelves were able to pay the money, ſince no caveat had been lodged by the charger.

The clerk of the bills is not bound as a ſubſidiary cautioner; he cannot be made liable, unleſs he has been guilty of ſuch a malverſation in his office, as may ſubject him in damages.

'The Lords ſuſtained the defence, and aſſoilzied.'

G. F.

Act. *G. Buchan-Hepburn.* Alt. *Macqueen.*

No. XCI. *March* 1. 1769.

LORD KENNET, and others;

Againſt

LADY FRANCES ERSKINE.

PRESCRIPTION.

Of Tolls and Cuſtoms.

BY a charter *anno* 1602, James VI. erected the town and port of Alloa into a burgh of regality and barony, in favour of John Earl of Mar, 'cum omnibus privilegiis et libertatibus liberarum nundinarum, 'et ut recipiant et exigant omnes tholas, cuſtumas, aliaſque divorias ea-'rund. ſicuti recipiuntur, et ut ſpectant alicui foro, ſeu liberis nundinis 'burgorum liberorum baroniae et regalitatis infra regnum noſtrum; et 'generaliter, cum poteſtate agendi, utendi, et exercendi omnes alias li-'bertates et commoditates quaſcunque, ad liberum burgum baroniae et 'regalitatis, forum hebdomadale, liberum nundinum, liberum portum 'marinum, et littus ſpectand.'

This clauſe was repeated in ſucceeding charters; and, upon the forfeiture of the laſt Earl, the eſtate being purchaſed by Lord Grange, was diſponed to him by the commiſſioners of inquiry, 'with the yearly 'fairs and markets thereof, and tolls and cuſtoms belonging to the ſaid 'Earldom.' In theſe terms, a charter under the great ſeal paſſed in 1725, and new charters were afterwards expede by Lord Erſkine, and Lady Frances Erſkine.

Under theſe titles, the family of Mar had been in poſſeſſion of levying, 1*ſt*, A duty upon goods landed at the ſhore; 2*dly*, A duty upon goods brought from the country, and paſſing through the town; 3*dly*, Certain dues at fairs and markets.

In a declarator of immunity, it was *pleaded:* That ſuch exactions could not be ſupported upon mere poſſeſſion, without a title; and that the

the charter was no title, ſince it conferred no other rights but ſuch as belonged to all boroughs of barony as ſuch.

Anſwered: The clauſe in the charter is broad enough to carry the cuſtoms in queſtion; 15th November 1754, town of Lauder *contra* Brown.

At the ſame time, it was contended, that immemorial poſſeſſion was ſufficient of itſelf; at leaſt, that it preſumed a title. The ſtatute 1587, c. 54. plainly proceeds upon that ſuppoſition; and ſo it is underſtood by Sir George Mackenzie, in his obſervations.

'The Lords ſuſtained the defence, and aſſoilzied.'

G. F.

Act. *Alex. Abercromby.* Alt. *Wight.* Reporter, *Auchinleck.* Clerk, *Roſs.*

No. XCII. *March* 7. 1769

PRINGLES;

Againſt

VEITCH.

SERVICE AND CONFIRMATION.

An elder Brother intromitting with the Effects of the Younger on his Death, found to have veſted in himſelf a Proviſion with which he was burdened.

JAMES PRINGLE of Bridge-heugh diſponed his whole effects, heritable and moveable, to his eldeſt ſon Alexander, with the burden of 27,000 merks provided to James his ſecond ſon, who ſurvived the father, but died without iſſue, minor, and inteſtate.

Alexander Pringle did not make up titles to his brother, and died unmarried, after executing an univerſal diſpoſition in favour of Mary Veitch, his mother.

Upon his death, an action was brought by Alexander and Margaret Pringles, firſt couſins to old Bridge-heugh, who, by the death of the eldeſt ſon, had become neareſt in kin to the youngeſt, concluding for payment of his proviſion, upon the ground that it was *in haereditate jacente* of James, and was properly taken up by their confirmation as executors *qua* neareſt in kin to him.

Pleaded in defence: Creditors do not ſuffer, though the neareſt in kin ſhould neglect to confirm. The creditors of the defunct are intitled

titled to confirm executors creditors. The privilege is extended by the act 1695. c. 41. to the creditors of the neareſt in kin. And from the ſtatutes upon this ſubject, it would appear to have been the intention of the legiſlature to leave it in the option of the neareſt in kin, whether to confirm or not. Thus the ſtatute 1690. c. 26. in particular, prohibits all charges to confirm, except at the inſtance of the relict, bairns, neareſt of kin, or creditors; from which it may be inferred, that they only are, in the eye of law, conſidered as intereſted in the executry; ſo that confirmation cannot be neceſſary merely to exclude the claim of an after neareſt in kin, who, at the time, had no manner of intereſt.

Indeed this idea was early received in the law; for, in a caſe obſerved by Haddington in 1610, Blackburn *contra* Rig, action was refuſed to a ſuperveening neareſt in kin, againſt a tutor, who had intromitted with the heirſhip moveables for the behoof of his pupil, the neareſt in kin for the time, who died without being confirmed. After-deciſions have proceeded upon the ſame principles, as July 1743, Macwhirter *contra* Miller; 3d February 1744, Bairds *contra* Gray; 21ſt December 1757, Brodie *contra* Stewart. In all theſe caſes, it was found, that poſſeſſion veſted the effects in the neareſt of kin, without the neceſſity of confirmation. It has alſo been found, that confirmation upon a partial inventory, veſts the dead's part in the neareſt of kin, 4th December 1744, *executors creditors* of Murray Kynnynmound *contra* Somervil. And the whole current of deciſions tends to ſupport the defence now pleaded.

There is no ſolid difference in the tranſmiſſion of moveables properly ſo called, and debts. The only queſtion, therefore, that remains, is, Whether Alexander Pringle actually attained poſſeſſion of his brother's proviſion. But, as to this, there can be little difficulty; he was not only in poſſeſſion of the document of debt, but, being the debtor in the obligation, he had the money itſelf in his hands. Had any other perſon been debtor in the ſum, and had payment been made to Alexander, or the ſecurity innovated, the right would have been fully veſted in him. And the law can never require ſuch a piece of mummery, as a ſimulate payment, and a nominal diſcharge granted by the neareſt in kin to himſelf.

Anſwered: The whole ſeries of our ſtatutes proceeds upon the idea of the neceſſity of confirmation, which is ſuppoſed, even in thoſe which were purpoſely framed for the advantage of the neareſt in kin, as 1540, c. 120. 1617, c. 14. 1690, c. 26, and more particularly in thoſe which relate to the ſubject of quots of teſtaments, as 1641, c. 61. 1661, c. 28. 1669, c. 19. 1701, c. 14. Had it been intended to diſpenſe with confirmations altogether, the legiſlature would not have been at the trouble of regulating them by ſo many anxious enactments. Indeed, in a double view, they are of more conſequence at preſent, than in any former period of our law; the inventories made up, and the caution found in confirmations, is the beſt ſecurity which remains, now that the penalties of vitious intromiſſion are in a great meaſure aboliſhed. And accordingly, in a late caſe, ſo ſatisfied was the court of the neceſſity of confirmation, that the obtaining a decree dative was found inſufficient to veſt the effects, where the perſon who had taken out the edict, happened to die before

fore actual confirmation, 23d January 1745, Carmichaels *contra* Carmichael.

In all the caſes referred to by the defender, there was ſome ouvert act declaratory of the intention of the neareſt in kin to take up the ſucceſſion; as, apprehending the poſſeſſion of moveables, exacting payment, or taking a bond of corroboration. In the preſent caſe, there was no act of that kind done by Alexander Pringle; and it is contrary to every idea of law, to ſuppoſe, that he could have become heir *in mobilibus* to his brother, without taking any ſtep to indicate that ſuch was his intention. This will appear the more obvious, if it be conſidered, that, whatever has the effect of veſting the moveables, cannot but have the correſponding effect of inferring an univerſal paſſive title; ſo that, however great the debts of the defunct may be, the neareſt of kin might be ſubjected to them without his knowledge, nay, contrary to his intention.

'The Lords repelled the defences, and decerned.'

Afterwards the defender inſiſted for a proof, that Alexander Pringle had intromitted with the whole moveables of his brother, and thereby incurred an univerſal repreſentation; and a proof having been allowed, it appeared from the evidence, that he actually intromitted with a horſe and riding-furniture, which had belonged to James, with his books, linens, and other clothes, being the whole effects he was maſter of, and that he had paid any debts which he owed.

'The Lords, having adviſed the teſtimonies of the witneſſes adduced, 'in conſequence of the former interlocutor, whereby it appears, 'that Alexander Pringle had an univerſal intromiſſion with his 'brother's effects, ſuſtain the defence, and aſſoilzie the defender.'

G. F

Act. *Macqueen*, Sollicitor *Dundas*. Alt. *Lockhart*. Clerk, *Pringle*.

No. XCIII. *March* 8. 1769.

COUTS and Co.;

Againſt

CALLIN.

LIS ALIBI PENDENS.

In a foreign Court.

AN action, for payment of a debt, was brought before the chancery court of the Iſle of Man, againſt a perſon reſiding there, but who afterwards reſided in the kingdom of Ireland.

Having occaſionally come into Scotland, the defender was compelled to find caution upon a ſummary warrant from the court of admiralty, and an action brought againſt him in the court of ſeſſion for the ſame debt.

Againſt this action he pleaded the exception of *lis alibi pendens*; in anſwer to which, reference was made to various caſes marked in the Dictionary under that head; and it was urged, that the defence had always been repelled, when founded upon a ſuit in a foreign country.

'The Lords repelled the defence, and found the action competent.'

G. F.

Act. *Alex. Gordon.* Alt. *W. Wallace.*

No. XCIV.

No. XCIV. *June* 21. 1769.

LAURIE and HUSBAND;

Againſt

SPALDING.

BONA FIDE CONSUMPTION.

From what period a bona fide *poſſeſſor is accountable?*

MRS MARGARET LAURIE, and Andrew Sloan Laurie, her huſband, having prevailed againſt Alexander Spalding of Home, in their reduction of the ſale of the lands of Ervies, made by James Laurie, the heir of entail in poſſeſſion for the time, as ſtated, N. C. III. 140. 24th July 1764, aud the judgment having been affirmed in the Houſe of Lords, a queſtion aroſe, From what period Mr Spalding was accountable for the rents?

Pleaded for the purſuers: The defender muſt be accountable from the date of the decree, that is, from the date of the Lord Ordinary's interlocutor, which was adhered to by the court, and affirmed in the laſt reſort.

When the judgment of an Ordinary is altered, a new interlocutor is pronounced, which can have effect only from its own date. But the caſe is different, where the interlocutor is adhered to: *There* the court refuſes the petition, and adheres; they adhere ſimply, and with all the qualities attending the interlocutor, particularly as to its date, in which reſpect, it is conſidered in the ſame light as if no petition had been preſented.

Anſwered: The defender is accountable only from the date of the judgment of the Houſe of Lords. His *bona fides* cannot be held to have ceaſed at any earlier period, unleſs it could be ſhewn, that the original citation was ſufficient to interrupt it. *Bona fides* is excluded by the *conſcientia rei alienae*; but, as the queſtion was of too doubtful a nature to allow the preſumption that ſuch conſciouſneſs was induced by the citation, ſo there is real evidence, that the defender did not entertain it during the dependence; otherwiſe he would not have ſubmitted to the expence of litigating the queſtion, both in this court, and in the houſe of Peers.

'The Lords found that the defender is bound to account for his in-
'tromiſſions with the rents of the lands, from the term of Martin-
'mas

'mas 1764, being the term ſubſequent to the interlocutor of the 'court, adhering to that of the Lord Ordinary.'

G. F.

Act. *Geo. Ferguſſon.* Alt. *Wight.*

No. XCV. *June* 28. 1769.

CHARLES BARCLAY MAITLAND, and others;

Againſt

LAMBERT, BARENGENS, and others.

COMMONTY.

Where there are common proprietors, a diviſion may proceed ſo as to affect the ſervitudes.

CERTAIN parts of the barony of Tillicoutrie had been feued out to many different vaſſals, with a right of paſturage upon the commonty of Tillicoutry, which was poſſeſſed by the feuers, in common with the baron their ſuperior.

Sir Robert Stewart of Tillicoutry, having purſued a diviſion upon the ſtatute 1695, it was objected, that the purſuer was ſole proprietor, the vaſſals having only ſervitudes; and the Lords found in 1740, that the diviſion could not proceed.

Charles Barclay-Maitland acquired the eſtate of Tillicoutry, and brought a new proceſs of diviſion, founded not only upon the ſtatute, but alſo upon common law. The greater part of the vaſſals concurred in the proceſs; but others oppoſed it, upon the ſame grounds, as in the former action; with this addition, that the matter was now a *res judicata*, by the judgment pronounced in that caſe.

It is unneceſſary to reſume the argument upon the general point, which was pretty much the ſame as in former caſes of the ſame kind.

With reſpect to the plea of *res judicata*, the purſuers obſerved, that the decree in the former caſe had not been extracted, and that, at any rate, it could not be pleaded againſt a ſingular ſucceſſor. Indeed here the parties are altogether different, Sir Robert Stewart having been oppoſed by the whole feuers; whereas a great majority of them concur with Mr Barclay. The original ſummons concluded only upon the act of parliament, but the preſent purſuers libel upon common law alſo.

Anſwered:

Anſwered: The exception *rei judicatae* is equally effectual againſt a ſingular ſucceſſor, as againſt the original party: 'Exceptio rei judica-'tae nocebit ei qui in dominium ſucceſſit ejus qui judicio expertus eſt.' L. 28. D. de except. rei jud. And it makes no difference, that a concluſion upon common law has been thrown into the ſummons; for though, at common law, a diviſion may be made where the whole commonty is poſſeſſed by proprietors *pro indiviſo*, yet it is not competent in the caſe of ſervitudes. Stair II. 7. 14. Bankton, II. 7. 32. & 33.

There is reaſon to believe, that the court was of a different opinion from their predeceſſors, and that, had the point been open, they would have repelled the objection to the diviſion; for, notwithſtanding the plea of *res judicata*, upon the former judgment, in the caſe of this very commonty, they appointed parties to be heard *in praeſentia*.

There was no occaſion, however, to give judgment; for, before the diet fixed for the hearing, a petition was preſented by James Erſkine, Lord Barjarg, one of the feuers, ſetting forth, 'That he had lately ob-'tained a diſpoſition from Mr Barclay-Maitland, of all and haill a pro-'portional part of the hills of Tillicoutry, correſponding to the valued 'rent of the third part of the lands of Drimmie, part of the ſaid ba-'rony of Tillicoutry, belonging in property to the petitioner, in pro-'portion to the ſaid Charles Barclay-Maitland's property-lands in the 'ſaid barony, intitled to a common property of the ſaid hills, and with 'the burden of the ſervitudes belonging to the feuers, correſponding to 'the ſhare of the property thereby diſponed to the ſaid James Erſkine.'

This diſpoſition contained a declaration, that the diſponee ſhould have no ſhare in the diviſion correſponding to the intereſt of the feuers having only ſervitudes, and that the part allotted to the lands of Drimmie ſhould be relieved of any ſervitude of paſturage acclaimable by the other feuers.

Upon this new *ſpecies facti*, it was contended, That, without impugning the judgment in the caſe of Sir Robert Stewart, the diviſion was competent, there being now an undoubted common property.

Anſwered: This is clearly an *alienatio judicii mutandi cauſa facta*, a nominal and fictitious property, created with the avowed purpoſe of prejudicating the queſtion in dependence. And it has been decided, that an aſſignation, *pendente lite*, could not put the other party in a worſe ſituation than he was before. Newbyth, 14th July 1666, Sharp *contra* Brown, Dict. *Litigious*, v. 2.

Independent of theſe objections, it was maintained, That the diſpoſition to Lord Barjarg could, at any rate, go no farther than to enable him to inſiſt to have a proportion of the property ſet off to himſelf, and to Mr Barclay Maitland, but without impinging upon the ſervitudes, which could not be affected by this contrivance.

A perſon having a right of ſervitude cannot inſiſt upon the maxim, *quod unaquaeque gleba ſervit*, emulouſly, and where his right would not be hurt by being reſtricted to a particular ſpot. But, in this caſe, the ſervitudes would become of little or no value, were they ſo reſtricted. The greateſt part of the commonty is unimproveable, and only fit for paſture; and were thoſe who have a ſervitude of paſturing a few cows, or a ſcore of ſheep, reduced to a particular ſpot of the muir, in proportion

to that right, the expence of herding would more than exhauſt all the advantage, ſo that they would be obliged to ſell their right to the ſuperior at an under value.

Nevertheleſs, 'The Lords having conſidered the production now 'made for Lord Barjarg, found the diviſion may proceed.'

G. F.

Act. *Lockhart.* Alt. *Maclaurin.* Reporter, *Auchinleck.*

No. XCVI. *June* 28. 1769.

THOM;

Againſt

LUNN.

CLAUSE.

Juſt and lawful debts.

A PERSON, after ſettling proviſions upon his younger children, diſponed his whole eſtate to his eldeſt ſon, in his contract of marriage, under the burden 'of his haill onerous, juſt, and lawful debts, 'preſently owing by him.'

In an action for payment of the proviſions, it was objected, that, being revocable at pleaſure, and payable at the granter's death, they were not comprehended under the clauſe in the diſpoſition.

'The Lords found the defender liable for the ſums contained in the 'bonds of proviſion.'

G. F.

Act. *Nairn.* Alt. *Macqueen.*

No. XCVII.

No. XCVII. *June* 29. 1769.

HASTIE;

Againſt

CAMPBELL.

PUBLIC OFFICER.

Schoolmaſter of a royal borough removeable ſummarily by the council, upon juſt cauſe.

MR JOHN HASTIE was admitted rector of the grammar-ſchool of Campbleton, by the magiſtrates and council, upon an examination by the preſbytery; and, beſide the allowance given by the town, received a yearly ſalary modified by the commiſſioners of ſupply.

After he had been ſome years in the office, a memorial was preſented to the council by Patrick Campbell of Knap, burgeſs, reſidenter in Campbleton, for himſelf and others, reſidenters in Campbleton, complaining that Mr Haſtie was irregular in his attendance upon the ſchool; that he was in the practice of correcting his ſcholars in a cruel and barbarous manner, to the danger of their health; and praying the magiſtrates to inquire into the matter, and give proper relief.

This memorial was ſerved upon Mr Haſtie, who gave in anſwers, but afterwards withdrew his compearance; and a proof having been taken, the magiſtrates found all the articles complained of proved, and deprived him of his office.

Mr Haſtie brought a reduction, and, objecting to the evidence, as led *ex parte*, *contended* that the procedure was irregular in various particulars.

1. Town-councils of royal boroughs are no more than adminiſtrators of the common concerns of the borough, but they are no court, and have no juriſdiction; ſo that Mr Haſtie's appearing and giving in anſwers could not infer prorogation. Even the magiſtrates had no juriſdiction in this matter. By act 1693, c. 22. School-maſters are declared 'liable 'to the trial, judgment, and cenſure of the preſbyteries of the bounds, for 'their ſufficiency, qualifications, and deportment in their office.' And the ſchool of Campbleton was not a mere eſtabliſhment by the borough; it was a parochial ſchool alſo.

2. There was no proper libel in this caſe. The memorial preſented to the council cannot be conſidered as a libel; no particular fact being ſtated in it, and no concluſion inferred, nor any thing laid which could amount to a relevancy.

3. Members

3. Members of the council were received as witneſſes, and afterwards acted as judges, indeed, as the purſuers are not deſigned, even parties may have been admitted to give evidence.

4. The proceedings were carried on without the inſtance, or even the concourſe of a procurator fiſcal, an indiſpenſible requiſite in every criminal caſe. There is no officer, who acts in the character of procurator-fiſcal for a town-council; which is an additional argument to ſhow that they were not competent to the queſtion.

Anſwered: The whole argument proceeds on the miſtake of conſidering Mr Haſtie as a perſon accuſed of a crime, and brought to trial in order to ſatisfy public juſtice. But, admitting that the town-council was not competent to take trial of crimes, that the memorial was not conceived in the form of a criminal libel, that the proceedings were not agreeable to the ſtrict rules of criminal procedure, in which the concourſe of a procurator-fiſcal is neceſſary; theſe things can have no weight in the preſent caſe. The queſtion here is, whether Mr Haſtie, the public ſervant of the borough, is not ſubject to the juſt controul of the magiſtrates and council, by whom he was admitted?

It has been found, indeed, that ſchoolmaſters, and other public officers, cannot be removed arbitrarily; but in no caſe has the court interpoſed, to counteract the diſcretionary power of removal, when exerciſed upon juſt and proper grounds; and, it appears from the deciſions of the court, that, in ſuch caſes, magiſtrates are not tied down to obſerve the niceties of criminal procedure, or even the ſtrict rules of legal evidence.

Theſe principles were eſtabliſhed in the caſe of the magiſtrates of Montroſe, and in other caſes collected in the dictionary, *voce*, *Public officer*. They have been followed, in later deciſions, as 10th November, 1747, Foulis *contra* Veſtry of Blackfriars-wynd chapel; 27th July 1756, Harvie *contra* Bogle and kirk-ſeſſion of Glaſgow.

The act of parliament 1693, ſeems to be confined to ſchools in the country; and if it be extended to thoſe in boroughs, can go no farther than to veſt a juriſdiction in the preſbytery cumulative with that of the magiſtrates and council.

The Lords 'repelled the objection to the competency of the magi-'ſtrates and council.'

Thereafter, the Lords having conſidered the proof, repelled the reaſons of reduction, and aſſoilzied the defenders. Upon a petition, they altered their interlocutor, and reponed the purſuer to his office. But this judgment was reverſed in the Houſe of Lords.

G. F.

Act. *Crosbie*. Alt. *Ilay Campbell*. Reporter, *Pitfour*.

No. XCVIII.

No. XCVIII. *June* 29. 1769.

D U F F;

Againſt

B R O D I E.

Kirk-ſeat carried by a Diſpoſition of Lands.

THE queſtion was, Whether a ſeat in a church was underſtood to be carried by a diſpoſition of lands, without being expreſſed in the diſpoſition.

Brodie of Windyhills had diſponed to Earl Fife, the lands of Muirtown, in the pariſh of Elgin, but without any mention of a ſeat in the church, which had been immemorially poſſeſſed by the proprietors of that eſtate. It appeared that the church had been rebuilt in 1683, at the joint expence of the borough and of the heritors, who were aſſeſſed in proportion to their valued rent. So that the queſtion came to be much the ſame as if it had occurred in the caſe of a country pariſh, though the defender endeavoured to diſtinguiſh it, by obſerving, that, in boroughs, it was common for perſons to acquire right to ſeats, without any relation to particular lands. But it did not appear that Mr Brodie's ſeat was in that ſituation.

'The Lords found the purſuer intitled to the ſeat, as part and perti-
'tinent of his lands.'

G. F.

Act. *Arthur Duff.* Alt. *John Douglas.* Reporter, *Barjarg.*

No. XCIX. *November* 15. 1769.

MARGARET PARK;

Againſt

WILLIAM GIB.

Terce due from Tenements in Boroughs of Barony.

MARGARET PARK, widow of James Gib, ſeveral years after her huſband's death, purchaſed a brieve, in order to be ſerved before the ſheriff of Renfrew, to a terce of an old tenement in the borough of Paiſley, in which her huſband James Gib had died infeft.

William Gib, the ſon and heir of James Gib, oppoſed this claim; to which he offered ſeveral objections, which the ſheriff repelled. William Gib advocated the cauſe; and the Lord Ordinary, before whom the advocation came, repelled the reaſons of advocation, and remitted the cauſe *ſimpliciter*.

Pleaded in a petition to the court for William Gib. 1*mo*, Terce is not due out of burgage-tenements. 2*do*, The ſubject in queſtion is a burgage-tenement, ſituated in the borough of Paiſley, the proprietors of which hold burgage.

Upon the firſt point, it was contended, that every writer on the law of Scotland had laid it down as eſtabliſhed law, that no terce was due out of burgage-tenements; and reference was made to a number of authorities, to ſhow that ſuch was the law.

But the determination of the queſtion ſeemed to turn chiefly upon the ſecond point ſtated for William Gib, that the ſubject out of which the terce was demanded was a burgage-tenement. And upon this point he argued, that, though Paiſley was not a royal borough, yet it was a borough erected by the King, founded upon ſpecial grants, with ample privileges, and holding of no ſubject-ſuperior. The proprietors of tenements within the borough hold them *in capite* of his Majeſty, by that ſpecies of holding, called burgage, and are entered and ſeiſed by the magiſtrates, acting as the King's bailies, in the ſame manner as practiſed in royal boroughs.

In 1488, the town of Paiſley was, by a charter from King James IV. erected into a free borough of barony, in favour of the then abbot of Paiſley, with very ample liberties and privileges. In 1496, the abbot and convent granted a charter to the magiſtrates, burgeſſes, and community of Paiſley, of the ſaid borough of Paiſley, and whole lands and ſubjects thereof, with ſundry rights and privileges. Upon the reformation, the ſuperiority of this borough returned to the crown, by the act

act of annexation 1587; and, in 1665, William Lord Cochran, Lord of erection of the abbacy of Paiſley, and William maſter of Cochran, his ſon, together with the magiſtrates, council, and community of the borough, granted procuratory for reſigning the borough in the hands of the crown, for new infeftments to be granted by his Majeſty to the magiſtrates, council, and community, and their ſucceſſors in office; and upon this reſignation, a charter was granted by King Charles II. granting and diſponing, 'dilectis noſtris balivis, theſaurario, conſiliariis, et 'communitate burgi de Paiſleto, ſuiſque ſucceſſoribus, totum et inte-'grum burgum et villam de Paſleto, cum acris burgalibus, croftis, te-'nementis, domibus, &c. cum foris, nundinis, privilegiis, aliiſque qui-'buſcunque pertinen. ad dictum burgum; cum poteſtate faciendi, 'eligendi, renovendi, et mutandi praepoſitum, balivos, burgenſes, of-'ficiarios, aliaque membra dicti burgi de Paſleto;' with fairs, markets, tolls, cuſtoms, and a variety of other privileges.

In terms of theſe charters, the magiſtrates have immemorially exerciſed the ſame juriſdiction that is competent to magiſtrates of royal boroughs, *ſecundum ſtatuta et leges burgorum*; they receive reſignations of the burgage-lands, give ſeiſin thereon, *ut mos eſt in burgo*; they enter heirs by haſp and ſtaple, in ſame manner as is practiſed in royal boroughs; the borough is the King's vaſſal; the burgeſſes hold immediately of the crown; the magiſtrates, in receiving reſignations and giving infeftments, act as the King's bailies; they have every characteriſtic of a borough, holding courts, creating burgeſſes, ſelf-government, &c. all which privileges are, by their charters given them, *adeo plenarie, integre, et honorifice ut burgi de Dumferling, Newburgh, et Aberbrothock:* And though they do not ſend a delegate to the convention of royal boroughs, or a repreſentative to parliament, that cannot annihilate or take away the privileges of the borough. Lands may hold burgage in other boroughs, as well as in royal boroughs. It never has been doubted, that the lands and tenements within the liberties of the borough of Paiſley are burgage. The burgeſſes are called out to watch and ward for the protection of the borough, under the authority of the magiſtrates, and are, in every reſpect, conſidered as burgeſſes; nor can any inſtance be pointed out wherever a terce was ſo much as claimed by the widow of a burgeſs of Paiſley.

Anſwered for Margaret Park: It cannot be denied, that the writers on the law of Scotland have laid it down as a fixed maxim, that terce does not extend to burgage-tenements; but it is remarkable that none of them have been able to aſſign any reaſon for ſuch maxim being received in our law, which, as appears from the *Regiam Majeſtatem*, and *Leges Burgorum*, and Balfour's Practicks, was not antiently the law of this country, but which it is, in this caſe, unneceſſary to inſiſt upon, as the tenement in queſtion is not a burgage-tenement, Paiſley not being a royal borough. A burgage-tenement or burgage-holding applies only to a tenement in a royal borough, or that kind of holding peculiar to royal boroughs, and cannot be extended to boroughs of regality or barony, no more than ſummary arreſtments, or other privileges peculiar to royal boroughs. Paiſley is no more than a borough of barony; ſo it appears from the charter from King James IV. in 1488, in favours of the abbot

of

of Paiſley, and charter from the abbot and convent of Paiſley in 1490, in favours of the magiſtrates; and though, upon the reformation, the ſuperiority of this borough returned to the crown, that made no alteration, as the borough muſt hold of the crown, in the ſame manner it formerly held of the abbots of Paiſley; and, as in the charters in favours of abbots, it is deſcribed as a borough of barony, it muſt ſtill remain ſuch: Neither will it alter the caſe, that, in this borough, heirs are entered in the ſame manner as in royal boroughs; ſuch is the caſe with Muſſelburgh, and other boroughs of barony; yet theſe boroughs cannot claim the ſame privileges with royal boroughs. Paiſley ſtands not on the rolls of parliament; it ſends no commiſſioner to parliament, nor to the convention of royal boroughs; neither does it pay any part of the ſupply as a royal borough; from all which it is evident, that it is no more than a borough of barony; and, as the reſtriction as to terce relates ſolely to royal boroughs, of conſequence, a terce muſt be due in this caſe.

'The Lords adhered to the Lord Ordinary's interlocutor, repelling 'the objections to the claim of terce.'

A. E.

For Gib, *Ilay Campbell.* For Park, *Robert Sinclair.*

No. C. *November* 30. 1769.

SCOT;

Againſt

GRAHAM, and others.

TACK.

Prorogation of a Tack, if good againſt Singular Succeſſors.

CERTAIN tacks, granted by John Rae of Caſtlebank, to commence after the expiry of the leaſes ſubſiſting at the time, were found reducible, at the inſtance of his real creditors, in reſpect the creditors were 'infeft in the lands let, before the tenants obtained poſſeſſion thereof, 'in virtue of thoſe tacks.'

It was *pleaded* for the tenants: That, ſo long as the proprietor continued in poſſeſſion, he could grant tacks with effect, and it has never been imagined, that tenants were bound to ſearch the records for incumbrances, before they ventured to enter into a leaſe.

Anſwered: The tacks in queſtion would have been good againſt the heir of the proprietor; they might perhaps have been good againſt a voluntary

luntary purchaſer, but they cannot be ſuſtained againſt onerous creditors, who ſtand in a very different ſituation, and againſt whom the prorogation of a tack has not, in any inſtance, been ſuſtained.

G. F.

Act. *Crosbie.* Alt. *Armſtrong.*

No. CI. *December* 1. 1769.

F O G G O;

Againſt

W A T S O N.

HUSBAND AND WIFE.

Pure Donation, in what Caſes irrevocable?

BY contract of marriage between Mr James Watſon, one of the miniſters of Canongate, and Anna Foggo, daughter of Walter Foggo, it was ſtipulated, that L. 300 Sterling ſhould be paid to Mr Watſon in hand, and L. 200 more at an after-period; which ſums were accepted, in full of all that could be aſked or craved, by and through Walter Foggo's death.

When Mr Foggo died, it appeared, that each of his children would draw conſiderably more than L. 500, on an equal diviſion; and a contract was entered into, whereby Samuel, Katharine, and Janet Foggo's, the three younger children, on the narrative, 'That they were ſenſible, 'that it was the inclination of their father to have made his eldeſt 'daughter equal with his other children,' became bound to pay L. 85 Sterling each, to Mr James Watſon, his heirs or aſſignees; and, on the other part, Anna Foggo, and Mr Watſon granted a joint diſcharge for their ſeveral rights and intereſts.

Upon Mr Watſon's death, his relict executed a revocation of her huſband's right to the ſums ſtipulated to be paid by her brother and ſiſters, upon the ground, that the claim to an additional ſhare of her father's effects, was a right competent to herſelf, and not to the huſband; and therefore, that the allowing the ſum to be taken payable to him, was a donation *inter virum et uxorem.*

Anſwered: After the diſcharge in Mrs Watſon's contract of marriage, ſhe had no right to any farther ſhare of her father's effects. Though, therefore, Mr Watſon may be ſaid to have received a donation, it was not received from his wife, but from her brother and ſiſters. Mrs Watſon could not convey to her huſband a right which was not in herſelf;

and it is an eſtabliſhed principle, that nothing can be conſidered as a donation, which does not take from the perſon ſuppoſed to make it. See L. 5. § 13. L. 28. § 2. L. 31 § 7. *D. de donat. int. vir. & ux.*

'The Lords found, that as the purſuer, and her deceaſed huſband, in 'their contract of marriage, accepted of the tocher therein contracted by the purſuer's father, in full of all they could aſk of him; 'ſo the grant afterwards made to the purſuer, was no other than a 'donation upon the part of the mother and younger children; and 'that, as they made it directly to Mr Watſon the huſband, ſo he 'owed it entirely to their generoſity, and the regard it would appear they had for him, and not to the purſuer, though her being 'Mr Watſon's wife probably was the origin of the connection: 'And therefore ſuſtain the defence, and aſſoilzie the defender.'

G. F.

Act. *Nairne.* Alt. *Blair.*

No. CII. *December* 2. 1769.

MANNERS;

Againſt

STEWART.

NAUTAE, CAUPONES, STABULARII.

A Carrier, who had undertaken to carry certain goods from Edinburgh to Kilmarnock, and to wait two hours for them, was found liable upon the edict for the value; the goods having been ſent by the agreed time, but he having gone ſooner, and left orders to ſay that he was ſtill in town; ſo that the goods remained in the carrier's quarters, where they were damaged.

G. F.

Act. *G. Buchan-Hepburn.* Alt. *James Boſwell.*

No. CIII.

No. CIII. *December* 5. 1769.

RIDDEL;

Againſt

The MARQUIS of TWEEDDALE.

PLANTING AND INCLOSING.

The Clauſe of the Act 1661. *c.* 41. *reſpecting Half-dike, is Perpetual.*

JAMES RIDDEL having purchaſed the lands of Dodhouſe and Dodhouſe-rig, conſiſting of about 1300 acres, and bounding with the eſtate of Tweeddale for the ſpace of 648 roods, inſiſted that the Marquis ſhould lay out one half of the expence of making an incloſure along the common boundary, in terms of the ſtatute 1661. c. 41.

Pleaded in defence: 1*mo*, The ſtatute was temporary, and the period for which it was to remain in force is long expired. The former enactments inforced with penalties, againſt heritors who ſhould not incloſe certain portions of their grounds, having proved ineffectual, the legiſlature was willing to try the effect of temporary benefits or privileges. In this view, the act 1661. c. 41. provides, that heritors poſſeſſed of L. 1000 Scots of rent ſhall incloſe 4 acres yearly, and plant them with trees, and that other heritors ſhall 'plant, incloſe, and ditch yearly, more or fewer 'aikers, according to their reſpective rents, for the ſpace of 10 years next 'enſuing. In order to encourage heritors to the obſervation of the ſtatute, it declares 'ſuch parts and portions of their ground as ſhall be ſo 'incloſed and planted, to be free of all manner of land-ſtents, taxations, 'or impoſitions of whatſoever nature, or quarterings of horſe, for the 'ſpace of 19 years next after the date hereof.'

Theſe clauſes are clearly temporary; and the clauſe reſpecting half-dike being intended to inforce them, muſt of courſe be temporary likewiſe. Indeed that matter is put out of all doubt by the ſtatute 1685. c. 39. which, upon the narrative that the time preſcribed in the act 1661, is *now* elapſed, provides, 'that it ſhall be obſerved for the ſpace of 19 'years next to come.'

2*do*, The ſtatute, though allowed to be in force, does not apply to this caſe, the conterminous lands being of ſuch a nature, as that the incloſure cannot be made by ditch and hedge. But this is the only ſpecies of incloſure authoriſed by law. The act 1457, c. 83. forbids dry ſtake hedges. Various ſtatutes direct the making of live fences; as 1457, c. 80. 1503, c. 74. 1535, c. 10.; and the act 1661, ſpeaks of planting, ditching, and incloſing, expreſſions which do not apply to a ſtone-wall.

3*tio*,

3*tio*, The legiſlature never intended to compel proprietors to incloſe their whole lands indiſcriminately. The act 1457, c. 80. obliges freeholders to plant trees and make hedges, 'after the faculties of their 'mailings, in place convenient therefor;' the act 1503, c. 74. mentions only *one* acre; and the act 1535, c. 10. mentions *three*. In like manner, the act 1661 requires *four* acres to be incloſed annually, and *that* not indefinitely, but 'of ſuch lands as the heritors ſhall think moſt fit for 'planting, and capable for incloſing.' The ſtatute, therefore, ought not to be extended to a whole farm or eſtate, of whatever extent or ſoil, which might be made the inſtrument of oppreſſion in the hands of the great and opulent; and, in this caſe, the lands propoſed to be incloſed are ſtore-farms, ſo hilly and mountainous, as to be incapable of improvement, by incloſing, or otherwiſe.

Anſwered: The act 1661, c. 41. conſiſts of various propoſitions, and contains ſundry enactments for promoting the improvement of the country; it ordains heritors of L. 1000 Scots annually to incloſe 4 acres, for the ſpace of 10 years ſucceſſively, and to plant trees of different kinds; it declares the lands ſo planted to be free of taxes for 19 years to come; it authoriſes the turning about of roads, for the encouragement of planting and incloſing; and, it appoints the adjacent heritors to be at equal expence in drawing the incloſure which parteth their inheritance.

The two firſt clauſes, obliging heritors to plant and incloſe, and indulging the lands ſo planted and incloſed with an immunity from taxation, are expreſsly declared to be temporary. But there is no ſuch declaration with reſpect to the other clauſes, which therefore, of neceſſary conſequence, are perpetual. Indeed it is clear, that the clauſe reſpecting half-dike, is a ſeparate and diſtinct propoſition, which has no relation to planting, and is not confined to the lands planted and incloſed in conſequence of the preceding branch of the ſtatute.

This conſtruction is ſupported by the terms of the after ſtatute 1669, c. 17. which, upon the narrative of that part of the ſtatute reſpecting half-dike, and the difficulties attending the execution of it, where the marches are crooked or unequal, or the bordering ground unfit for bearing a dike, or receiving a ditch, empowers the judge-ordinary to adjudge from the one heritor to the other, ſuch part of the ground as occaſions the inconveniency, and to fix a new line of march, ſo as may be leaſt to the prejudice of either party. This ſtatute was intended to inforce that part of the act 1661, and would have been highly abſurd, if the firſt had been underſtood to be temporary, ſince, in that caſe, it would have been within a year of expiring at the time.

The act 1685, c. 39. is inaccurately expreſſed; but, upon an attentive conſideration, it is obvious, that the legiſlature did not mean to extend the prorogation to the whole heads of the former ſtatute. If the act 1661 was temporary, it expired in 1671, and it would have been abſurd to ratify a ſtatute long ago expired. The ratification, therefore, does not relate to the whole ſtatute, but to thoſe branches of it which were intended to be perpetual; while the prorogating clauſe reſpected thoſe branches of it which were temporary.

Accordingly, in a caſe which occurred after the lapſe of the 10 years, the act 1661 was put in execution, ſo far as reſpected the expence of a march-

march-dyke, 9th January 1679, Seton *contra* Seton ; and, in an after caſe, it was found to be perpetual, with regard to the power of turning about highways ; 28th July 1713, Dunbar *contra* Gordon. On the ſame principles, a conterminous heritor was found liable in his proportion of the expence of upholding a march-dike already built, 20th January 1758, Lockhart *contra* Sievewright ; nor, in any caſe, has the defence been ſuſtained, or even pleaded, that this branch of the ſtatute was temporary.

To the 2*d* : The ſtatutes referred to reſpect not the preſent queſtion, being intended to compel heritors to make hedges and plant trees, without any regard to march-dykes. But the act 1661 does not ſpecify any particular kind of fence, and provides in general, that ' the next adja-' cent heritor ſhall be at equal pains and charges in *building*, *ditching*, ' and *planting* that dike which parteth their inheritance ;' which words muſt be underſtood, *applicando ſingulo ſingulis*, of ditching and planting where a hedge can be conveniently made, of building, where a ſtone-wall is neceſſary.

Indeed the act 1669 clearly points out, that march-incloſures are of different kinds. It provides for an exchange of property, ' where the ' bordering ground is unfit or incapable of bearing a dike, or re-' ceiving a ditch ;' ſo that all the defender could at any rate demand, is, that the march ſhould be ſhifted to ground proper for making the incloſure, either upon his own property, or that of the purſuer.

To the 3*d* : The preſent action is not founded upon the obſolete and temporary ſtatutes referred to by the defender, but upon the act 1661, c. 41. which, in the enactment reſpecting march-incloſures, is general, and not limited to any particular number of acres. Nor is there any reaſon to ſay, that the conterminous lands are of ſuch a nature, as that they can reap no benefit from being incloſed. The contrary is evident from the improvements already made by the purſuer, as aſcertained by the report of the ſurveyor authoriſed by the court.

' The Lords repelled the defences, and found, that the Marquis of ' Tweeddale is bound to concur with Mr Riddel, in making the in-' cloſures propoſed upon the marches of their reſpective property, ' except where the high road lies upon or near the march, and to ' be at one half of the expence of ſuch incloſures.'

Act. *Ro. Campbell.* Alt.

G. F.

No. CIV. *December 7. 1769.*

FOGGO and GALLOWAY;

Againſt

SCOT and OLIVER.

LEGAL DILIGENCE.

Can Poinding proceed in name of the Aſſignee, upon a Horning raiſed by the Cedent?

MARGARET ELLIOT having taken out diligence againſt Gavin Elliot the common debtor, and given a charge, aſſigned her debt and diligence to Scot and Oliver, who executed a poinding in their own name.

In a reduction of this poinding, a remit was made by the Lord Ordinary to three writers to the ſignet, who reported, 'That there ſeems no 'good reaſon why a poinding may not follow, in the name of an aſſignee, 'upon letters raiſed and executed in the name of the cedent, eſpecially 'as the old ſtyle of an aſſignation generally provides that diligence may 'follow, or be executed either in the name of the aſſignee or cedent.'

Pleaded for the purſuers: The duty of meſſengers, in the execution of diligence, is purely miniſterial. They are ſtrictly bound by the terms of their warrant, and cannot depart from it in any reſpect. Haddington March 1604, Moncur *contra* Ld. Craid; Dury, 24th January 1627, Erſkine *contra* Lord Erſkine.

The practice referred to in the report of inſerting a ſpecial clauſe, empowering the aſſignee to do diligence in the cedent's name, would ſeem to prove, that, without ſuch a clauſe, he can only uſe diligence in his own.

Indeed, the very point now in queſtion was expreſsly determined 11th July 1745, Hay *contra* Stewart, where, upon a report by the whole body of writers to the ſignet, the Lords cut down an arreſtment which had been uſed by an executor upon a horning taken out by the defunct.

Anſwered: The letters of horning, containing warrant to poind for payment of the debt therein mentioned, authoriſed the meſſenger to carry on a poinding for behoof of the perſon who was in the right of the debt for the time. The will of the letters is to make payment of the debt to the creditor at whoſe inſtance they were obtained; and yet there cannot be

be a doubt, that they would have been ſufficiently obeyed, by making payment to the aſſignee.

But, however ſtrictly meſſengers may, in other diligences, be tied down to the preciſe terms of their warrant, a greater latitude muſt be allowed in poindings, where they truly act in a judicial capacity, as ſheriffs in that part, and are intitled to determine among the parties competing for the property of the goods. Stair, IV. 30. 6. and IV. 47. 26.

Poindings of moveables are analogous to appriſings of lands; but it cannot be doubted, that, after the denunciation in an appriſing, the creditor might aſſign his debt, in which caſe, the appriſing would go out in the name of the aſſignee. Indeed, this point was expreſsly decided 5th February 1745, Ramſay *contra* creditors of Clapperton of Wyliecleugh; and it is difficult to ſuppoſe, that the powers of the meſſenger are more limited in poindings of moveables than in appriſings of lands, which are of much more conſequence.

Replied: The powers of the meſſenger do not ſeem to be greater in poindings than in other diligences, in which alſo he acts as ſheriff in that part. The caſe of Clapperton is but a ſingle deciſion, and ought not, by analogy, to be extended to poindings; indeed, in that caſe, it appears that poſſeſſion had followed on the appriſing for no leſs than 60 years.

'The Lords ſuſtained the objection, and reduced the poinding.'

G. F.

Act. *Armſtrong*. Alt. *Macqueen*.

No. CV. *December* 13. 1769.

A L V E S

Againſt

A L V E S.

IMPLIED CONDITION.

If a Donation falls by the Donee's Death before it came to Hand?

WILLIAM ALVES doctor of medicine, ſon to Andrew Alves writer to the ſignet, being deſirous of ſending a ſum of money to his father and aunt from the Eaſt Indies, where he was ſettled, bought a bill for L. 200, drawn upon of London, of which he tranſmitted four duplicates, in as many different letters, of date 27th and 29th December 1759, 8th February and 5th March 1760.

By

By ſubſequent letters, the doctor's intention appeared to have been that L. 150 of the money ſhould go to his father, and L. 50 to Henrietta Alves his aunt, wife to Richard Cockburn of Clerkington.

Andrew Alves died on the 23d of January 1760, long before the firſt duplicate arrived; and, upon hearing of his father's death, Dr Alves wrote to Richard Cockburn, that, after paying the L. 50 to Mrs Cockburn, he might diſpoſe of the remainder as he pleaſed.

Meanwhile the bill came into the hands of Alexander Gray, writer to the ſignet, the huſband of Margaret Alves, ſiſter to the doctor, who immediately ſent it to London, and obtained payment, after procuring letters of adminiſtration in favour of his wife, as executor to her father.

Dr Alves died in April 1762, leaving his whole effects to Henrietta Alves, his aunt, who brought an action againſt Mr and Mrs Gray, for payment of the L. 150.

Pleaded in defence: The bill was indorſed to Andrew Alves upon the 27th of December 1759, ſome weeks before his death. Its contents, therefore, were transferred to him during his life, as effectually as by an intimated aſſignation, and, of conſequence, were *in bonis* of him at his death. The indorſation carried right to the value in the hands of the perſon drawn upon; and, even ſuppoſing him not to have had money of the drawer's in his hands, it carried the action of recourſe againſt the drawer.

And, though it ſhould be ſuppoſed to have been competent to the doctor to recall the bill at any time, before it was actually delivered into his father's hands, yet that was *naturally* impoſſible the moment the ſhip ſet ſail; and, at any rate, the right of Andrew Alves muſt be deemed complete, ſince no ſuch ſtep was taken during his life.

Some of the Roman lawyers have held, that donations are incomplete until they be followed by a formal acceptance. But this ſubtlety has not been received with us; Lord Bankton I. 9. 9. ſays, 'a donation may 'become effectual without acceptance;' and Sir James Stewart, *v. Donatio non acceptata*, 'If a donation be made and not repudiated, it is 'thought it will be held as accepted; ſo as if a creditor ſhould affect it, 'the donatar could not thereafter repudiate the ſame.'

Anſwered: It is a point eſtabliſhed in the Roman law, that a donation cannot become effectual until it is known to the donee, and accepted of by him; *L.* 55. *de Oblig. et act. L.* 10. *D. de Donat.* See alſo *Voet ad d. tit. num.* 11.; *Perez. ad d. tit. C.* § 23.; *Sande dec. Friſ. l.* 5. *tit.* 1. *def.* 1.

Nor is this rule rejected by the law of Scotland: The quotation from Lord Bankton does not prove the defender's doctrine; for, taking the whole paſſage together, the meaning is clear, that donations do not become effectual without acceptance, unleſs in the ſpecial caſe where delivery is made to a third party for behoof of the donee.

The authority of Sir James Stewart is ſtill leſs applicable. He does not ſay, that a donation is effectual without acceptance; but, in treating of the nature of implied acceptance, he lays it down that a donee who does not repudiate, is held to accept, which muſt proceed upon the ſuppoſition that the donee is in the knowledge of the gift, elſe he can neither repudiate nor accept.

In

In the preſent caſe, there was no delivery to the donee, or to a third party for his behoof. The bill therefore remained in the power of Dr Alves, who was intitled to diſpoſe of it in his laſt will, or otherwiſe. Indeed it was the duty of the bearer of the letter to have reſtored it to the Doctor, when he found that his father was dead; and his accidentally or improperly giving it out of his hand, cannot make any alteration upon the matter of right.

'The Lords, in reſpect that Andrew Alves died within a few weeks 'after the bill was indorſed, and ſent to him from Calcutta in the 'Eaſt Indies, and that thereby the ſaid bill was never received by 'Andrew Alves in his lifetime, and that the indorſation appears 'to have been intended as a preſent, and that Dr Alves, after hear-'ing of his father's death, by his letters to Richard Cockburn, his 'factor, deſires him to receive the money due by the ſaid bill, 'find that the money due by ſaid bill belongs to the purſuer as ex-'ecutor to Dr Alves.'

A. E.

Act. *Sollicitor Dundas.* Alt. *Wight.* Reporter, *Kennet.*

No. CVI. *December* 13. 1769.

SCOTS;

Againſt

CARFRAE.

IMPLIED CONDITION.

If a Legacy, to be divided among the Children of the Legatee, *falls by the Legatee's Predeceaſe?*

WILLIAM SCOT executed a teſtament, by which he appointed his ſon James his ſole executor and univerſal legatary, with a clauſe whereby he obliged him to pay 'to Iſobel Swanſton, my well-be-'loved ſpouſe, the ſum of 1500 merks, and that *at the firſt term of 'Whitſunday or Martinmas after my deceaſe*, with annualrent after the 'term of payment; *and which ſum of* 1500 *merks, the ſaid Iſobel Swan-*

'*ſton ſhall leave and diſtribute among her daughters* at her death, as ſhe 'ſhall think fit.'

Iſobel Swanſton predeceaſed her huſband; and he having died ſome years after, an action was brought againſt George Carfrae, the diſponee of James Scot, the ſon, at the inſtance of his ſiſters, for payment of the 1500 merks provided to Iſobel Swanſton, the fee of which they contended was veſted in them by their father's ſettlement.

Pleaded for the purſuers: The 1500 merks were indeed made payable to Iſobel Swanſton; but ſhe had only a right of liferent in that ſum, which ſhe was bound to divide among her daughters, in whom, of conſequence, the fee was veſted: Nor can they be deprived of their right by the predeceaſe of their mother, more than the mother could have forfeited her liferent by the predeceaſe of the daughters. Her repudiating her intereſt in the legacy could not have affected them, and the accident of her death cannot have a ſtronger effect.

Anſwered for the defender: By the conception of the deed, the fee of the 1500 merks was intended to be in the mother: A limited fee indeed, which ſhe was bound to tranſmit to her daughters, in the event of the proviſion taking place, but which might have been affected by her creditors to the excluſion of the daughters, who therefore had no right of fee, nor any thing more than a hope of ſucceſſion.

But this right of fee never was veſted, even in the mother; it was pendent on the uncertain event of her ſurvivance, and cut off by her predeceaſe; *dies incertus habetur pro conditione.*

The preciſe caſe is decided by Voet; 'Si teſtator legaverit Titio, pro 'ſe *et heredibus ſuis*, Titius autem vivo teſtatore moriatur, heredibus Ti-'tii legatum non debetur;' *ad tit. Qu. dies leg. num.* 1. *Id. ad tit. de mort. cauſ. donat. num.* 7.

And, agreeably to this, the court have decided in the caſe of proviſions payable at a certain age, or at the deceaſe of the granter, in various inſtances, to be found in the Dictionary, *v. Implied condition*, p. 423. 424.; and in ſundry later caſes, as 4th June 1741, Paterſon *contra* Paterſon, obſerved by Home; 1ſt February 1749, Bells *contra* Maſon, obſerved by Lord Kames; and 18th December 1760, Macculloch *contra* Roſs.

'The Lords found, that the proviſion of 1500 merks fell by the pre-'deceaſe of Iſobel Swanſton, and did not tranſmit to her daughters.'

G. F.

DECISIONS

DECISIONS omitted at their Dates.

No. CVII. *February 7.* 1766.

JANET MILLER and GEORGE BARCLAY, her Huſband, for his Intereſt, and ISOBEL, &c. Children of Andrew Aikman and Margaret Miller;

Againſt

MARY DICKSON, Relict of the deceaſed GEORGE MUIRHEAD of Whitecaſtle.

PRESCRIPTION.

Poſſeſſion of Lands upon Infeftments proceeding on Precepts from a wrong Superior, ſufficient to give Right to the Subjects by the poſitive Preſcription. 2do, *The Poſſeſſion of a Diſponee joins to the Poſſeſſion of his Author to complete Preſcription.*

MARGARET and Katharine Muirheads, as heirs-portioners of line, ſerved and retoured, to John Muirhead of Parſon-lands, their grandfather, brought a proceſs of reduction and declarator againſt Mary Dickſon, relict of George Muirhead of Parſon-lands, their brother, for aſſerting their right, as heirs to their grandfather, to thoſe lands, and for annulling and ſetting aſide a right to ſaid lands, executed by George Muirhead, in favours of his ſpouſe Mary Dickſon.

The purſuers, Margaret and Katharine Muirheads, having died, the proceſs was wakened at the inſtance of Janet Miller and Jean, &c. Aikmans, as heirs, ſerved and retoured, to Margaret and Katharine Muirheads, who contended, 1*mo*, That George Muirhead, the huſband of Mary Dickſon, had made up no proper title to theſe lands, which, before the reformation, held of one of the prebends of the collegiate church of Biggar, the parſon of which, with conſent of the Earl of Wigton, the patron, in 1655, granted a charter to John Muirhead of ſaid lands, to be holden of the parſon and his ſucceſſors, for payment of a ſmall feu-duty: That George Muirhead had taken a precept of *clare* from the Earl of Wigton, the patron, in 1711, as heir to John Muirhead, upon recital of the 54th act 1661, which directs the vaſſals holding of benefices of laick patronage, to take their infeftment from the patron

patron in place of the titular; whereas the ſuperiority of theſe lands is declared to belong to the crown by 23d act 1690, ſo that George Muirhead's infeftment was erroneous, and he muſt be conſidered as dying in a ſtate of apparency *quoad* theſe lands, and conſequently his diſpoſition in favours of Mary Dickſon his wife could carry nothing; wherefore, the purſuers, as heirs of line to John Muirhead, the perſon laſt regularly infeft, were intitled to take theſe lands: And, 2*do*, It was contended for the purſuers, that, if the titles made up by George Muirhead were erroneous and void, neither he, nor his diſponee Mary Dickſon, could pretend any right by the poſitive preſcription, their poſſeſſion being founded on theſe erroneous titles. And George Muirhead dying within the 40 years, the poſſeſſion of his diſponee Mary Dickſon could not be joined to his poſſeſſion ſo as to make up the 40 years.

In anſwer, it was, upon the part of Mary Dickſon the defender, endeavoured to be ſhown, 1*mo*, That the Earl of Wigton was undoubted ſuperior of the parſon-lands, in conſequence of the ſtatutes 1567 and 1592, whereby lay-patrons were authoriſed to diſpoſe of their provoſtries, &c. And that, by the ſtatute 1661, the patrons of theſe provoſtries, &c. were conſtituted ſuperiors to the vaſſals of theſe ſubjects, whereby the Earl of Wigton, as patron of the church of Biggar, became ſuperior of theſe lands which held of the parſon, and, conſequently, was intitled, *proprio jure*, to grant a precept and infeftment in favours of George Muirhead, who thereby eſtabliſhed in his perſon a proper title to the lands: And, 2*do*, That, ſuppoſing the precept and infeftment to have been originally erroneous, as it had ſtood unquarrelled for more than 40 years, and had been the title of poſſeſſion all that time, the right was eſtabliſhed by the poſitive preſcription; as George Muirhead poſſeſſed upon it for 39 years and 9 months, and the defender, his diſponee, compleated the poſſeſſion for 40 years, before any challenge was brought.

> 'Auguſt 6th 1765, The Lords found, that the lands in queſtion held 'of the parſon of Biggar *qua* parſon, and that the precept taken, 'and the title made up by George Muirhead, was erroneous and 'void: Repelled the defence of preſcription, and decerned.'

The firſt part of this interlocutor the defender Mary Dickſon acquieſced in; but the laſt part of it, which repelled the defence of preſcription founded on 40 years poſſeſſion, upon the precept of *clare conſtat* from the Earl of Wigton, and infeftments thereon, ſhe brought under review by petition, and *argued*,

Preſcription is defined to be an *adjectio dominii per continuationem poſſeſſionis*. George Muirhead was not, nor could not be proprietor of the lands till he was infeft as heir to his predeceſſor, and, if that infeftment was void, he could not otherwiſe acquire the property than by preſcription, as an heir unentered is not proprietor by the law of Scotland; according to which *mortuus non ſaſit vivum*. The queſtion then is, what could prevent George Muirhead from acquiring that property he wanted by poſſeſſion, upon what muſt be acknowledged to be a juſt title of preſcription?

It

It has been ſaid, he could not preſcribe againſt his own heirs of line the purſuers, which is ſo far true, that preſcription againſt a man's heirs at law cannot well be underſtood, no more than preſcription againſt a man's ſelf; for, *cui bono*, ſuch a preſcription? what right could he acquire? By it his heir of line would be obliged to make effectual his deeds, whether onerous or gratuitous: But the miſtake lies here, that the preſcription does not run againſt the heirs of George Muirhead, but againſt the heirs of his grandfather; for, upon ſuppoſition of his dying in a ſtate of apparency, the heirs of the grandfather John can only take up theſe lands by ſervice to him, and ſo the purſuers, in this caſe, have made up their titles. And, though the heirs of George Muirhead be the ſame perſons with the heirs of John, that does not vary the principle of law; they do not claim the ſubject *qua* heirs of George, if ſo, they could not challenge his diſpoſition to the defender; but they claim *qua* heirs of the remote predeceſſor, to whom they have ſerved. And, although a man cannot preſcribe againſt his own heir, he certainly may againſt the heir of his grandfather or any other predeceſſor, and thereby acquire a liberty of diſpoſing of the ſubject, even gratuitouſly, in the ſame manner as a man, by preſcribing againſt his heir of entail, acquires to himſelf the free diſpoſal of the ſubject.

The purſuers ſay, the heirs of John Muirhead were *non valentes agere*, to interrupt this preſcription, becauſe they could have brought no effectual action for evicting this ſubject from George Muirhead. But though ſuch *valentia agere* is ſometimes found neceſſary in the negative preſcription, as in the caſe of a bond liferented by a wife, the preſcription of which is not found to run againſt her, *ſtante matrimonia*, becauſe ſhe is not, during that period, *valens agere*; yet it is not required by any ſtatute or deciſion, in the caſe of the poſitive preſcription, which is founded on different principles, and introduced by different ſtatutes. The foundation of the negative preſcription is the negligence of the creditor in not making a demand during 40 years; and it, therefore, has been held a good excuſe, if, during part of that time, he was not *valens agere* for recovering of the debt. But the poſitive preſcription ſtands upon a quite different footing, viz. poſſeſſion upon a proper title for 40 years; and the ſtatute 1617, which introduces it, expreſsly declares, that ſuch a poſſeſſor ſhall not be troubled or inquieted by any perſon pretending a prior infeftment, 'nor upon no other ground, reaſon, or argument competent in law, except for falſehood,' without making any diſtinction, whether the true proprietor was negligent or not in proſecution of his right, or whether, during any part of the 40 years, he was *non valens agere*. No ſtop to preſcription is mentioned in the act, except minority, and even that exception has been diſputed, as relating only to the negative preſcription; becauſe the poſitive is founded on a preſumption *juris et de jure*, that the poſſeſſor had prior evidence, which had been loſt by fatality, againſt which minority could not be pleaded. The diſtinction between the poſitive and negative preſcription was clearly eſtabliſhed by the deciſion, Innes *contra* Innes, 31ſt December 1695, obſerved by Fountainhall.

But the purſuers, in this caſe, were *valentes agere*. If the precept of *clare conſtat* was erroneous, there was an action competent to them, viz.

an action of declarator, that George Muirhead, upon the title of the infeftment 1711, had no right to diſpoſe of his eſtate gratuitouſly, in prejudice of the purſuers, the heirs of his grandfather. It is true, they could not have evicted the eſtate from George Muirhead ; but ſuch a *valentia agere* is not required, otherwiſe preſcription could never run againſt a tailzie, while the perſon who poſſeſſed in fee ſimple was alſo heir of entail, which might be the caſe for hundreds of years ; but it has been found ſufficient that an heir of entail was *valens agere* to get the entail recorded, or to oblige the poſſeſſor to make up his titles, in terms of the entail, though not to evict the eſtate ; *Douglas of Kirkneſs* contra *Aiton of Kinnady* ; and *Innes* contra *Innes of Auchluncart*, 31*ſt December* 1695, *Fountainhall.* Neither does the caſe of *Gray* contra *Smith*, 8*th November* 1751, quoted for the purſuers, apply to this queſtion ; it differed from the preſent caſe in ſundry particulars ; there the ſettlement was upon the heir-male, who made up his titles upon inveſtiture, in favours of the heirs at law, by which he had in his perſon two rights, both unlimited, the one, a perſonal right upon the deed of ſettlement, the other, a real right, made up by ſervice and infeftment upon the old inveſtiture. And the argument that moved the court there, was, that there could be no *adjectio dominii* by poſſeſſion on the infeftment, as he had an abſolute right to the eſtate in fee-ſimple, by the deed of ſettlement, which will not apply to this caſe, as George Muirhead, if the precept was erreneous, had no right to the eſtate, real or perſonal, but what he acquired by the poſitive preſcription.

Anſwered for Janet Miller and the other purſuers : The poſitive preſcription is a creature of the law, introduced and eſtabliſhed by the ſtatute 1617, which diſtinguiſhes between ſingular ſucceſſors and heirs ; as to the firſt it requires a charter of the lands, with infeftment, cloathed with 40 years uninterrupted poſſeſſion ; and, as to heirs, it requires connected ſaſines, proceeding upon precepts of *clare* or retours. And although the ſtatute, in the caſe of heirs, reſts ſatisfied with ſaſines, or precepts, or retours, it will by no means follow, that the production of a precept of *clare* or retour is equal to a charter ; and, if ſo, the defender is not well founded in her defence of preſcription. George Muirhead was no ſingular ſucceſſor ; he ſucceeded *qua* heir ; the defender produces no charter, or original right in her perſon, equivalent thereto, as required in the caſe of ſingular ſucceſſors ; and, conſidering him as an heir, the defender does not produce connected infeftments for the ſpace of 40 years. A precept of *clare* contains no grant of the lands ; it imports no more but an authority from the ſuperior to introduce the heir into the poſſeſſion of his predeceſſor. The 40 years were not elapſed during the life-time of George Muirhead ; there was no renewal of the infeftment in the perſon of any other heir. The defender's poſſeſſion, after her huſband's death, muſt be aſcribed to the diſpoſition in her favours, and cannot be conjoined with her huſband's poſſeſſion, ſo as to give her the benefit of the poſitive preſcription. The ſtatute in the caſe of heirs requires connected ſeiſines ; and ſingular titles, not compleated by infeftment, cannot be conjoined with ſeiſines proceeding on precepts or retours, in order to found the poſitive preſcription.

But,

But, ſuppoſing that the precept of *clare* and infeftment 1711 ſhould be conſidered as a good title of preſcription, it would not avail the defender. George Muirhead had a double title to theſe lands; he was heir of line, and heir of inveſtiture, which, independent of any grant, was a good title for poſſeſſion; and therefore, his poſſeſſion can, with no juſtice, be aſcribed to the erroneous and void precept from the Earl of Wigton: For though, in a queſtion with third parties, poſſeſſion under either of theſe titles might be ſufficient to ſupport the right, yet, in a queſtion with the heirs of the former proprietor, the poſſeſſion muſt be aſcribed to that title which gave the proper right. No man can preſcribe againſt himſelf, or his right heirs; it is implied in every idea of preſcription, that ſomething is to be acquired, and that there ſhould be ſome perſon againſt whom preſcription is to run, and who muſt be intitled to interrupt. Both parties agree, that this eſtate was the undoubted property of George Muirhead; he, therefore, could acquire no right by preſcription which he had not before; his apparency *qua* heir of the former inveſtitures was a legal title of poſſeſſion; and, though he made up his titles erroneouſly, that could make no alteration in the deſtination of heirs; and, as he would not, by that poſſeſſion, preſcribe againſt himſelf, as little could he preſcribe againſt his right heirs: While both titles centred in him, the one proper, the other improper, the law muſt conſider the poſſeſſion as held under the proper title; nor does the deciſion in the caſe Mackerſton, and ſome later caſes, where two rights centered in the ſame perſon, infringe this general rule; in all theſe caſes, there was a manifeſt benefit and advantage to be acquired under the one title, in preference to the other. The fetters of an entail were to be knocked off; a fee ſimple was to be acquired, inſtead of a tailzied eſtate; and therefore, the law might juſtly aſcribe the poſſeſſion to the preferable right; though, even in theſe caſes, the point was held doubtful. But, with no reaſon can that principle be extended to the preſent caſe, where nothing was to be acquired under one title more than the other, and where there was no perſon againſt whom that preſcription could be ſaid to be running, or whoſe right could be cut off, and conſequently no perſon to interrupt. And, as both titles were equally beneficial, and the one a proper title, the other improper, it ſounds oddly, that the improper title ſhould be eſtabliſhed by preſcription, and the proper title cut off. And ſo this point was judged in two remarkable caſes, the one reſpecting the eſtate of Dundonald, 26th January 1726, the other more recent, Smith *contra* Gray.

It is a rule in law, that *contra non valentem agere non currit praeſcriptio*: The purſuers had neither title nor intereſt to challenge the titles made up by George Muirhead; there muſt be a right to found an action: The purſuers had but a bare hope of ſucceſſion, which gave no immediate right; and, if they were not in condition to have interrupted the preſcription, it cannot run againſt them. The defender ſays, the exception of *non valens agere* applies only to the negative preſcription; but no reaſon can be aſſigned why that exception ought not to protect againſt the poſitive, as well as the negative preſcription; the *ratio legis* is the ſame in both; and to forfeit a perſon of a right before he had it, is abſurd;

abſurd ; and this was fully argued and determined in the caſe of Duke of Lautherdale *contra* Earl Tweedale, 25th January 1678.

'*February 7th*, 1766. The Lords, on adviſing the petition and anſwers, found the precept of *clare conſtat*, with the infeftment thereon in favours of George Muirhead, is a habile title for preſcription : Found it competent for the defender, in this caſe, to found upon her own and George Muirhead's poſſeſſion, in order to make out her plea of preſcription ; and repel the purſuers objections thereto, founded on the precept of *clare* being granted by a wrong ſuperior, in reſpect preſcription is ſufficient to ſopite that defect ; and remit to the Lord Ordinary to hear parties on the fact, how long the peaceable poſſeſſion continued, and to do therein as he ſhall ſee cauſe.'

And to this interlocutor the court adhered, March 6th 1766, upon adviſing a petition for Janet Miller, &c. with anſwers for Mary Dickſon.

A. E.

For Janet Miller, *Alexander Lockhart*, and *George Wallace*.
For Mary Dickſon, *James Burnet*, *James Montgomery*, and *Henry Dundas*.

No. CVIII. *February* 12. 1766.

Sir JOHN GORDON *of Invergordon, Baronet* ;

Againſt

Captain JOHN FORBES *of New, Factor upon the annexed eſtate of the late Earl of Cromarty.*

BONA FIDES

Will not protect againſt Statutory Penalties.

THE eſtate of Cromarty, lying moſtly in the ſhire of Cromarty, became forfeited to his Majeſty, by the attainder of George Earl of Cromarty, and was, by ſtatute *25th Geo.* II. annexed to the crown. Captain Forbes was named factor for the public on the eſtate of Cromarty, and acted as ſuch for many years ; he was neither proprietor nor ſuperior of any lands in the county of Cromarty ; but, in ſeveral of the acts of parliament appointing commiſſioners of ſupply for that county, Captain Forbes was named as a commiſſioner, and deſigned 'Captain 'John Forbes of New, factor upon the annexed eſtate of Cromarty ;' and,

and, in conſequence of being ſo named, he acted with the other commiſſioners, when occaſion required.

Sir John Gordon exhibited a complaint to the court of ſeſſion againſt Captain Forbes, for recovering penalties incurred, by Captain Forbes acting as a commiſſioner of ſupply, without being poſſeſſed of the qualification of L. 100 valued rent, required by law; and the court, 7th Auguſt 1765, found he had no title to act, and was liable in the penalty; but, upon adviſing a petition for Captain Forbes, with anſwers for Sir John, the court, 18th December 1765, 'ſuſtained the defence of *bona* '*fides* pleaded for Captain Forbes, and aſſoilzied him.'

Pleaded, in a reclaiming petition for Sir John Gordon: No perſon can pretend to be *in bona fide*, when tranſgreſſing a public law; ſuch *bona fides* can only be deduced from a ſuppoſed ignorance of the law: But it is an eſtabliſhed maxim, *ignoratia juris neminem excuſat*; and this maxim applied in the ſtrongeſt manner to the preſent caſe, as the very acts of parliament, which contained Captain Forbes's name, and under the authority of which alone he could pretend to act, would have ſatisfied him, if he had but looked at them, that he had no title to act, not being poſſeſſed of a legal qualification; which amounts to this, that the very commiſſion, under which he preſumed to act, contains a prohibition againſt his acting, notwithſtanding of which, he acted as if legally qualified; and, in theſe circumſtances, there is no room for the defence of *bona fides*.

But, even ſuppoſing that Captain Forbes had acted *bona fide*, that defence cannot, in this caſe, be liſtened to. In queſtions of this nature, the juriſdiction of the court is purely miniſterial; the ſtatute has created the offence, and defined with preciſion wherein it conſiſts, and, with equal accuracy, fixed the puniſhment that muſt be inflicted; and therefore, if the offence is actually committed, the court cannot liberate the offender from the penalties. The act 1701 inflicts certain penalties for wrongous impriſonment; a perſon, ignorant of law, may counteract that ſtatute, without intending ſo to do; but, it is believed, the court would not, on that account, think that the perſon tranſgreſſing could be liberate from the ſtatutory penalties; and therefore, Captain Forbes's ſuppoſed *bona fides* cannot, in this caſe, be liſtened to, as a defence ſufficient to relieve him from the penalties he has incurred, by acting contrary to law.

Anſwered for Captain Forbes: In our Scots acts before the union, and for many years after the union, no particular qualification in land was required; and numbers of perſons were named commiſſioners *ratione officii*, as factors, bailies, tutors, &c. and ſometimes an alternative nomination of the heritor himſelf, or another for him in his abſence; and, in this very county of Cromarty, in the late ſupply-acts, it has been the practice to appoint factors to act in abſence of their conſtituents; yet the legiſlature never could mean, that factors thus conditionally appointed ſhould be heritors, and as ſuch have qualifications. Captain Forbes's caſe is more favourable than any private perſon's factor; the eſtate of Cromarty is forfeited; there is no proprietor who can poſſibly attend the meetings of the commiſſioners; the factor is therefore the only perſon who can attend to the intereſt of the eſtate in that particular; and, being named *virtute officii*, it cannot be thought that the law meant to require his being poſſeſſed of the qualification of an heritor.

But even if it could be maintained that the law did require his having a legal qualification in valued rent, ſtill the *bona fides*, in this caſe, muſt afford ſufficient defence. Captain Forbes does not plead that ignorance of the law is any excuſe, or that any perſon who tranſgreſſes a clear public ſtatute can be preſumed to be *in bona fide*; but what he maintains is, that, if he has tranſgreſſed, he has been miſled by the legiſlature itſelf, by the general opinion of the country, and by the deciſion of this court in the caſe of Wick, 1ſt January 1729, Sinclair *contra* dean-of-guild of Wick. He ſaw himſelf appointed a commiſſioner in the county, under a character inconſiſtent with the notion of his being an heritor, or having valuation in the county; and, by the caſe of Wick, he ſaw that perſons named *ratione officii* were intitled to act without any other qualification; and it has been the practice, in moſt counties, that perſons named *virtute officii* have acted without any other qualification, and free from apprehenſion of being liable in penalties: Where a ſtatute enacts penalties, it inflicts them as a puniſhment for a tranſgreſſion; and it would be contrary to juſtice to inflict puniſhment where there was no intention to tranſgreſs.

'The Lords altered the laſt interlocutor, and found Captain Forbes 'liable in the ſtatutory penalties.'

A. E.

For Sir John Gordon, *Lockhart, Alexander Wight, and Robert Blair.*
For Captain Forbes, *Ilay Campbell, et alii.*

No. CIX. *June* 17. 1766.

Meſſrs CHARLES and ROBERT FALLS Merchants in Dunbar, Chargers;

Againſt

ALEXANDER PORTERFIELD of Fulwood, Merchant in Glaſgow, Suſpender.

What Negotiation required in Bills payable at Sight.

TEN pipes of Madeira wine, the property of Mr Porterfield, were, at Charleſtown South Carolina, ſhiped on board the Black prince, a ſhip of the Meſſrs Falls, bound to Dunbar, and conſigned to the care of the Meſſrs Falls. The veſſel arrived at Dunbar 1ſt April 1764, which the Meſſrs Falls, by a letter of 3d April, notified to Mr Porterfield, and deſired to know to whom they ſhould apply, at Edinburgh, for payment of

of the freight, duty, and other charges, of the extent of which, they ſaid, they would, in a few poſts, ſend Mr Porterfield a note.

On the 24th April, the Meſſrs Falls tranſmitted to Mr Porterfield an accompt of the duty, freight, and charges, amounting to L. 129 : 1 : 0 Sterling, and add, 'For which you will ſend us, in courſe, an order on 'Edinburgh, as you know the duties are money down.'

Mr Porterfield, on the 3d May, tranſmitted to the Meſſrs Falls, a bill, dated 2d May, drawn by Thomas Johnſton merchant in Glaſgow, on William Borthwick merchant in Edinburgh, for L. 129 : 1 : 0 Sterling, payable three days after ſight, to Mr Porterfield, or order, bearing value received, and indorſed by Mr Porterfield to the Meſſrs Falls, who, on the 7th May, acknowledged receipt of the bill, which they ſent to Mr Borthwick, the perſon drawn on, to be accepted and returned to them.

Mr Borthwick happened not to be in town at the time Meſſrs Falls letter, with the bill, reached Edinburgh; but his clerk wrote Meſſrs Falls, 11th May, That Mr Borthwick was ſoon expected home, when he ſhould preſent the bill, and doubted not but he would honour the ſame.

Upon 26th May, the Meſſrs Falls ſent a clerk to Edinburgh, to require Mr Borthwick either to return or accept the bill, when Mr Borthwick deſired the bill might be left with him a few days longer, when he ſhould either accept it, or return it proteſted for not acceptance; but the bill not being returned, Meſſrs Falls, on 5th June, again ſent a clerk, with orders either to get the bill accepted, or to proteſt it. Mr Borthwick delivered the bill to Meſſrs Falls clerk, with a proteſt taken againſt himſelf, on 31ſt May, for not acceptance, and againſt the drawer and indorſer for recourſe, &c. And, on 6th June, Meſſrs Falls clerk took a new proteſt, not only againſt the drawer and indorſer, but againſt Mr Borthwick for not acceptance, and not payment, and damages, &c. on account of keeping up the bill without accepting it, or returning it with a proteſt for not acceptance.

Meſſrs Falls, on the 7th June, wrote Mr Porterfield, acquainting him of what had happened, and incloſing the bill, with the two proteſts, and deſiring to be reimburſed of their money, in reſpect the draught had not been anſwered; and, on 14th June, Mr Porterfield returned the bill and proteſts, and refuſed payment, on account of the bills not being properly negotiate; and, at ſame time, informed Meſſrs Falls, that Johnſton, the drawer of the bill, had ſtopt payment on the 5th June. On receipt of that letter, Meſſrs Falls cauſed regiſtrate the proteſt, and charge Mr Porterfield for payment; and ſuſpenſion being preſented, the queſtion came before Lord Coalſton as Ordinary, who took the cauſe to report to the court.

Pleaded for the ſuſpender: The laws and practice of all mercantile nations, require the moſt exact diligence in the regular negotiation of bills; they muſt be preſented *quam primum* for acceptance, and, when due, for payment; and very fatal conſequences may enſue from the ſmalleſt neglect or delay in the regular negotiation of them. It may, in ſome very particular caſes happen, that accidents occur, which muſt prevent the taking of thoſe ſteps of negotiation, which are in general required, and

and that without the holder of the bill being to blame; and, in ſuch caſes, it would be unjuſt he ſhould forfeit his recourſe; but, where the delay proceeds from his own neglect or fault, he muſt anſwer for the conſequences; and, in this caſe, the chargers have been groſsly negligent in the negotiation Their entruſting the bill to Borthwick himſelf; leaving it in his hands for ſuch a ſpace of time, without inquiring whether he had accepted or not; indulging him in a farther time to deliberate; neglecting to inquire after that time was elapſed; the bill itſelf ſtill allowed to remain in his hands, though proteſted by him on the 31ſt May; no proteſt taken by the chargers till 6th June, the day after Johnſtone had failed; no notice given the ſuſpender of theſe proceedings before 7th June, evince, in the ſtrongeſt manner, not only an undue negotiation, but even a negligence not common among men of buſineſs in their own affairs; and, ſo ſenſible were the chargers of the irregular negotiation of this bill, that, in the inſtrument of proteſt taken againſt Borthwick, by them, they ſet forth the irregularity of his proceedings, and proteſt againſt him for damage, &c. on that account.

It has been argued for the chargers, That this being a bill payable three days after ſight, they were not bound to preſent it for acceptance *quam primum*; and, in ſupport of this argument, reference was made to two deciſions, Gordon *contra* Innes, 7th February 1735, obſerved in Dictionary, *voce* Bill of Exchange; and William Andrew *contra* Syme, 21ſt November 1759. In the firſt of theſe caſes, the delay of preſenting the bill was very ſmall; all that could be alledged being, that, if it had been tranſmitted for acceptance, in courſe of poſt, it might have been exigible four days before the accepter broke; whereas, by neglecting a poſt, the accepter broke before it was exigible. In the other caſe of Syme, the delay of preſenting the bill for acceptance was occaſioned by unavoidable accidents, the porteur of the bill being detained by contrary winds on his paſſage to Holland; by which means the bill could not be preſented till about the time the Dunlops of Rotterdam, on whom it was drawn, broke; which is a very different caſe from the preſent. Some latitude may be allowed as to preſenting bills at ſight for acceptance; but it is impoſſible to maintain that ſuch bills are totally exeemed from the common rules of negotiation; and, after being preſented for acceptance, which aſcertains the term of payment as preciſely as if the bill had been drawn payable at a day certain, it is abſurd to maintain that the ſame exact diligence is not requiſite in the after-ſteps of negotiation, as in the caſe of other bills; this is a diſtinction no lawyer ever thought of, for which no reaſon can be aſſigned, nor precedent produced.

Another defence was maintained by the chargers, that the bill in queſtion being indorſed to them, not for value inſtantly received, or *in ſolutum* of what the ſuſpenders owed them, but in ſecurity of a prior debt, for which, when paid, the ſuſpender was to have credit, they were not bound to do diligence; and, in ſupport of this plea, reference was made to the deciſion, William Alexander *contra* Robert Cuming, 9th January 1758. The ſuſpender has no occaſion to conteſt the authority of that deciſion, the circumſtances of which were very different from what occur in this caſe; and a ſimilar queſtion occurred in a much later caſe, between Groſſet and Murray the receiver-general; where Groſſet, contending that

no

no recourſe was competent againſt him, in reſpect of the undue negotiation of a bill tranſmitted by him to the receiver-general, who, on the other hand, pleads, as the chargers here do, that it was but a depoſite or pledge in a prior debt, to be credited when paid, and that an aſſignee in ſecurity was not bound to diligence; and though this court, in February 1762, ſuſtained the receiver-general's defence, the judgment was, in March 1763, reverſed upon an appeal, and the receiver-general found liable for the contents of the bill; but, in the preſent caſe, the bill was not indorſed to, or depoſited with the chargers, as a ſecurity for a prior debt, but as an immediate remittance for replacing the money deburſed by the chargers on the ſuſpender's account.

Anſwered for the chargers: Bills, when firſt introduced, were always drawn payable at a day certain; ſo that the drawer or indorſer had reaſon to expect the money to be paid, and their obligation to be extinguiſhed at that preciſe day; and, if it was not ſo, it was equitable that the holder of the bill ſhould be obliged to take a proteſt, and give due notice to the indorſer or drawer, to enable them to take the proper ſteps for their relief. But bills are ſometimes intended for the conveniency of the perſon to whom they are indorſed or made payable, who being uncertain of the time he can demand acceptance or payment, gets the bill made payable at ſight; and ſuch bills are, in effect, no other than letters of credit, which the *porteur* may uſe ſooner or later according to his conveniency; and, on this principle, the court determined in a caſe obſerved in Dictionary, 7th February 1735, that bills drawn on ſight did not require the ſame negociation with bills payable on a day certain; and ſo was again determined, William Andrew *contra* Syme, 21ſt November 1759. In order to get free of the weight of this deciſion, the ſuſpender argued, that, tho' the *porteur* had a diſcretionary power as to preſenting a bill on ſight, yet, after it was preſented, he became liable to the ſame exact negociation as is required in the caſe of bills payable on a day certain. But the chargers can ſee no foundation for this diſtinction. It ſeems ſtrange, that the *porteur* ſhould put himſelf in a worſe condition by preſenting his bill, than if he had taken no ſtep at all. If he could not forfeit his recourſe by not preſenting it, neither can he do ſo by lodging the bill ſooner than he needed to do.

The negociation of bills of every kind muſt depend on circumſtances; where an accident prevents exact negociation, the creditor will not forfeit his recourſe. The chargers tranſmitted the bill to Borthwick the very day they received it; it was owing to the accident of his abſence, and their reſiding at a diſtance, that they were ſo long in getting his final anſwer. It is a common practice to ſend bills to merchants on whom they are drawn, if the *porteur* does not reſide in the ſame place. The bill, by its nature, did not lay them under any obligation for uſing exact negociation to ſecure their recourſe, of which they cannot be deprived by the ſuperveening unexpected event of Johnſton the drawer's bankruptcy. The negociation uſed would have founded both the chargers and ſuſpender in recourſe upon Johnſton; and, as the chargers have been guilty of no *lata culpa*, there is no ground in law for throwing the whole loſs occaſioned by Johnſton's bankruptcy upon them.

The chargers accepted of this bill not in payment, but in ſecurity of the debt due them by the ſuſpender; they were not to paſs it to his credit till it was actually paid, and, as indorſees in ſecurity, were not bound to exact diligence; ſo was determined, Alexander *contra* Cuming, 9th January 1758. In the caſe of Groſſet *contra* Receiver-general, founded on by the ſuſpender, many ſpecialities occurred, upon which Groſſet pleaded, to ſhow, that, in that circumſtantiate caſe, the indorſee had taken the riſk of the bill intirely upon himſelf.

'Upon report of Lord Coalſton, and having adviſed the informations 'given in by each party, the Lords found, that the chargers, Meſſrs 'Charles and Robert Fall, have no recourſe againſt the ſuſpender 'Mr Porterfield for the contents of the bill charged on; and there-'fore ſuſpend the letters *ſimpliciter*, and decern.'

G. F.

No. CX. *November* 25. 1766.

CAPTAIN JAMES STEWART Factor on the Eſtate of Leith-hall;

Againſt

PATRICK LEITH Tackſman of Chriſt-kirk.

TACK.

Tenant's Oath in a Judicial Rental cannot give a Verbal Sett of Lands the Effect of a written Tack.

PATRICK LEITH, at Whitſunday 1756, entered to the poſſeſſion of the lands of Chriſt-kirk, in conſequence of a verbal ſett from Mr Leith of Leith-hall; and, after Leith-hall's death in 1764, Captain Stewart, as factor for Mr Leith's ſon, a minor, brought an action before the ſheriff of Aberdeenſhire for removing Patrick Leith from theſe lands. The ſheriff decerned in the removing, and the cauſe was brought into the court of ſeſſion by ſuſpenſion.

Leith-hall, before his death, had taken up a judicial rental of his eſtate, when Patrick Leith compeared among the other tenants, and emitted an oath, in ſubſtance importing, that he poſſeſſed the lands of Chriſt-kirk, and others therein mentioned, by agreement with Leith-hall, for 19 years from Whitſunday 1756, for payment of a certain tack-duty particularly mentioned; and this oath ſubſcribed by the tenant was, by a diligence from the court, recovered out of the factor's hands, and upon it Patrick Leith founded, as ſufficient to ſupport his poſſeſſion for 19 years, from Whitſunday 1756. And

Pleaded,

Pleaded, That, though the law required writing to intervene in bargains with regard to heritable rights, the form of that writing is no where aſcertained; it is enough if the intention of parties appear; and, in this caſe, the agreement of parties is perfectly clear from the tenant's depoſition, where the term of entry, the endurance of the tack, and the rent payable, are diſtinctly ſpecified, and taken down in writing, ſubſcribed by the tenant, and accepted of by the maſter; which, joined to the poſſeſſion which followed, and the proprietor's receiving the rent agreeable thereto, muſt be held as ſufficient to ſupport the tenant's defence againſt the removing.

Anſwered: The purpoſe of taking the judicial rental was no other than to aſcertain the rents payable by the different tenants, and could not alter the nature of the right or title under which the tenants hold their farms, ſo as to impoſe ſtanding leaſes upon lands poſſeſſed by verbal agreement, which, tho' ever ſo explicite, are not binding upon either party for more than one year. The oath, in this caſe, imports no more than that ſuch were the terms of the verbal agreement between Leith-hall and the tenant; but, as that agreement could only be binding for one year, the tenant, by ſetting forth the terms of that verbal agreement in his oath, which was taken down in writing, cannot invert the nature of that agreement, or create any ſtronger obligation againſt the proprietor than what the verbal agreement itſelf imported.

'The court, 5th Auguſt 1766, ſuſtained the reaſons of ſuſpenſion.
'But, upon adviſing a reclaiming petition for Captain Stewart, with
'anſwers for Patrick Leith, 25th November 1766, that interlocutor
'was altered, and the letters found orderly proceeded. And a petition
'for Patrick Leith againſt this laſt interlocutor was, 10th December
'1766, refuſed without anſwers.'

A. E.

r Captain Stewart, *Lockhart* and *Coſmo Gordon*. For Patrick Leith, *David Rae* and *Robert Blair*.

No. CXI. *November* 27. 1766.

Mr PATRICK HALDANE Advocate,

Againſt

ANNE, AGNES, &c. HALDANES, Daughters of the deceaſed John Haldane, and their Huſbands.

Effect of a general Service, tanquam legittimus et propinquior haeres, *to a Father.*

MUNGO HALDANE of Gleneagles, in implement of a contract between him and his brother Patrick, in 1675, diſponed the lands

lands of Lanark, part of the eſtate of Gleneagles, ‘ in favours of Pa-
‘ trick, and the heirs-male of his body, and aſſignees whatſoever ; whilk
‘ failing, to return to the ſaid Mungo Haldane, and the heirs-male of
‘ his body ; whilk failing, to the heirs-female of the body of Patrick the
‘ eldeſt, ſucceeding without diviſion ; which failing, to the ſaid Mungo
‘ Haldane his neareſt and lawful heirs-male whatſoever ; which failing,
‘ to his heirs whatſoever.’

Patrick died in 1686, without executing the procuratory contained in the foreſaid diſpoſition ; and, in 1693, John, the ſon of Patrick, was ſerved and retoured heir in general, *tanquam legitimus et propinquior haeres*, to his father. But no farther ſtep was taken to compleat his titles before 1726, when, without making up titles to the procuratory by a ſervice of heir-male and of proviſion, he compleated his titles upon his former general ſervice, and expede a charter under the great-ſeal to himſelf, and the heirs-male of his body, and aſſignees whatſoever ; whom failing, to the other heirs mentioned in the diſpoſition 1675; and, upon this charter, infeftment followed in October 1726.

John had two ſons, Alexander and Patrick, and ſix daughters; and, in 1746, he executed a diſpoſition of the lands of Lanark, in favours of his ſecond ſon Patrick, then reſiding in England ; and, in 1757, Patrick executed a diſpoſition of the eſtate in favours of his ſix ſiſters, equally among them.

Upon the death of John Haldane and his two ſons, Alexander and Patrick, the laſt of whom died in 1765, Mr Patrick Haldane advocate, the grandſon and heir-male of Mungo Haldane, the original diſponer, obtained a brieve from chancery, for ſerving himſelf heir-male of proviſion in general to Patrick Haldane his grand-uncle. In this ſervice, appearance was made for the ſix daughters of John Haldane and their huſbands, who produced the diſpoſition by John to Patrick their brother, and by Patrick to them, in bar of the ſervice. Mr Haldane was ſerved, all objections being reſerved to the ladies.

Mr Haldane brought a proceſs of reduction and declarator, for ſetting aſide the rights founded on by the daughters of John Haldane, and particularly, the diſpoſitions 1746 and 1757, above mentioned. The ladies brought a reduction of Mr Haldane's ſervice and retour ; and the principal point debated in theſe mutual proceſſes was, whether John Haldane, by his general ſervice, *tanquam legitimus et propinquior hæres* to his father Patrick, did carry and veſt in his perſon, the perſonal right and unexecuted procuratory in the diſpoſition 1675? Or, Whether it was not neceſſary that he ſhould have been cognoſced heir-male and of proviſion, according to the deſtination of that deed?

Pleaded, for Patrick Haldane : In ſpecial ſervices, the claim is adapted to the infeftment in the predeceſſor, and the claimant muſt prove himſelf to be heir in that character and deſcription, to which, by the inveſtiture, the right is deviſed ; but, in general ſervices, the law is otherwiſe ; the claim does not aſcertain any particular right that is thereby to be carried ; it is the chracter alone that is to be aſcertained. It is optional to the party under what character he ſhall claim, whether as heir of line, heir-male, heir of conqueſt, heir of proviſion, &c. ; although all theſe characters may unite in one and the ſame perſon, he may betake himſelf to any of them he pleaſes. If his predeceſſor dies poſſeſſed of two eſtates,

ſtates, the one deviſed to heirs-general, but loaded with debt, the other limited to heirs-male, and ſo ſettled, as not to be chargeable with debt; and the claimant happens to be both heir-male and heir of line, he may repudiate the eſtate deviſed to heirs of line, and obtain himſelf ſerved *legitimus et propinquior hæres maſculus*, and an heir ſo ſerved will not be intitled to the eſtate deviſed to heirs-general, or ſubjected to an univerſal repreſentation. The only means by which the lieges are certiorated of the repreſentation of a deceaſed perſon, is by the ſervice of his heirs, who, before the inqueſt, not only aſcertain their propinquity, but likewiſe declare the character under which they claim; or, in other words, what rights and ſubjects they mean to veſt in themſelves by the ſervice.

If the plea maintained for the ladies, the daughters of John Haldane, is well founded, the unavoidable conſequence muſt be, that, in every caſe where there is coincidence of characters, as heir-male, heir of line, &c. in the ſame perſon, a ſervice, ſuch as occurs in this caſe, will not either aſcertain the character under which the heir claims, or the ſubjects veſted in him by the ſervice, unleſs it could be maintained, that, where there is a coincidence of characters, as heir-male, heir of line, &c. in the ſame perſon, that perſon, by ſerving heir in any character, is underſtood to take up the ſucceſſion of the defunct in every character; a doctrine not hitherto adopted in the law. Nor is this difficulty removed by the ſervice, in this caſe, aſcertaining John Haldane to be the eldeſt ſon of his father, and of conſequence his heir-male. The ſervice, indeed, proves the propinquity, and that the claimant was intitled to repreſent his father as heir-male; but it does not aſcertain that he intended to repreſent his father in that character. And, in ſupport of theſe pleas, theſe deciſions were referred to; Edgar *contra* Maxwell of Barncleugh in 1738, Dictionary, *voce* Repreſentation; Menzies of Coulterallers *centra* Dickſon of Kilbucho; and the caſe of Lourie of Redcaſtle's ſettlement.

Anſwered for Anne, &c. Haldanes: The ſervice of their father, John Haldane, *tanquam legitimus et propinquior haeres* to his father Patrick, eſtabliſhed in him the right to the unexecuted procuratory of reſignation in the diſpoſition 1675. The words *legitimus et propinquior haeres*, are underſtood in law to apply to other heirs, as well as heirs of line, and particularly to heirs-male; and, upon this principle, was the queſtion, Earl of Dalhouſie *contra* Lord and Lady Hawley, determined, 13th November 1712. In this preſent caſe, the inqueſt having found John Haldane *propinquior et legitimus haeres* to his father Patrick, muſt neceſſarily be underſtood to have found him heir-male to his father, as he could not be *propinquior et legitimus haeres* to him, without being his eldeſt ſon; and, if he was the eldeſt ſon, he muſt of neceſſity be his father's heir-male; and, on theſe principles, were determined the caſes, Livingſton *contra* Menzies, 22d January 1706; and Bell *contra* Carruthers, 21ſt June 1749.

It is a rule in law, '*Quotiens in actionibus, aut in exceptionibus, ambigua oratio eſt, commodiſſimum eſt accipi, quo res, de qua agitur, magis valeat quam pereat; l. 12. de rebus dubiis.*'

A ſervice is to be conſidered as an action proſecuted by the claimant before the inqueſt; and, agreeable to the above rule, ought to be conſtructed in the way moſt beneficial to the claimant, eſpecially in this caſe, where the eſtate in queſtion was the only ſubject intended to be taken up by the ſervice. John Haldane, by being found neareſt and lawful heir, is found to be the eldeſt ſon, that is, the heir-male of his father; and his intention to carry, by that ſervice, the lands of Lanark, is manifeſt, from his executing the procuratory of reſignation, contained in the diſpoſition 1675, as having right thereto, in virtue of that ſervice; by his expeding a charter, and taking infeftment thereon, and poſſeſſing the eſtate upon theſe titles.

In general, where different characters concur in the ſame heir, it is admitted he may aſſume one of thoſe characters, and repudiate the reſt; but, it is denied, that, when an heir takes upon him one character, he can repudiate another character, which is neceſſarily an inherent part of the character taken up by him. In this caſe, after John Haldane was ſerved neareſt and lawful heir in general to his father, he could not reject any ſubject diviſable to heirs-male, ſo as to free himſelf from the burthens affecting that ſubject. Caſes may occur where a ſervice, as *propinquior et legitimus haeres* to another to whom the claimant is both heir of line and heir-male, will not carry a ſubject deſcending to heirs-male; but that will not affect this caſe, where John Haldane could not poſſibly be neareſt and lawful heir to his father, without being likewiſe his heir-male. The deciſions referred to by Mr Haldane do not apply; for, in all of theſe caſes, there was a poſſibility that the character of heir, claimed under the ſervice, might have ſtood in the perſon of another, which, in this caſe, was impoſſible, as the character of heir-male could be in no other perſon than John Haldane, who was ſerved *propinquior et legitimus haeres* to his father, which could not have been without his being the eldeſt ſon and heir-male.

'The Lord Auchinleck Ordinary found, that, as Patrick did not expede a ſeiſine on the precept contained in the diſpoſition 1675, John Haldane his ſon, upon the father's death, made up a proper and legal title to the perſonal right which was in his father, by obtaining himſelf ſerved and retoured heir in general to his deceaſed father, whereby he is cognoſced *legitimus et propinquior haeres dict. Patricii Haldane ejus patris*, which aſcertained upon record, not only his univerſal right, but alſo, that he was heir-male of the body of Patrick, and ſuperſeded the neceſſity of a ſervice as heir-male.'

'And to this interlocutor the court, 27th November 1766, adhered, upon adviſing a petition for Mr Haldane, with anſwers for Anne, &c. Haldanes.'

A. E.

For P. Haldane, *Henry Dundaſ* et alii. For Anne, &c. Haldane, *David Graeme* et alii.

No. CXII.

No. CXII. *January* 21. 1767.

WILLIAM ELLIOT and others, Creditors of EDWARD ATCHISON;

Againſt

GEORGE MALCOLM.

INTEREST,

If due on Sums arreſted.

EDWARD ATCHISON poſſeſſed the farm of Ewiſlees, and, on quitting the poſſeſſion, ſold the ſtocking on the farm to George Malcolm at an appriſed value; and part of the price was, ſoon after the purchaſe, paid to the proprietor for rents due; the remainder was arreſted in Malcolm's hands by ſundry of Atchiſon's creditors, which obliged Malcolm to raiſe an action of multiple-poinding, in order that he might be ſafely exonered of the balance in his hands.

In this proceſs the creditors appeared, and ſundry proceedings were had, by which the proceſs was kept depending about a year before their reſpective intereſts were ſettled; which being done, they inſiſted, that Malcolm ſhould be found liable in intereſt upon the balance in his hands; and the Lord Ordinary decerned for intereſt at the rate of 4 *per cent.*

Malcolm applied to the court by petition, and *pleaded*, That he was interpelled by the diligence of the competing creditors from paying the balance: That he was bound to have it ready at a call, to be diſtributed among thoſe who ſhould be found to have right to it: That it was not enough to ſay, he might have lent out the money; if he did ſo, it was at his own riſk. An executor uplifting ſums not bearing annualrent, and laying out a balance at intereſt, was not liable to account for ſuch intereſt; July 1730, Creditors of Thomſon *contra* Monro. Truſtees for creditors are not liable in annualrent for ſuch ſums as from time to time come into their hands in the courſe of their management; 4th January 1730, Truſtees for Colonel Johnſton's creditors. This was none of thoſe caſes where intereſt is due either *ex lege* or *ex pacto*; nor do the circumſtances of the caſe render it proper for the court to interpoſe its equitable powers.

Anſwered for the creditors: Had Mr Malcolm conſigned the money, they would have put it in a banker's hands, who would have paid intereſt for it; by not doing ſo, he was *lucratus*, by having the uſe of the money;

money, and, in ſuch caſes, annualrent was due; Dictionary, *voce* Annualrent, p. 42.; and, therefore, both on principles of law and equity, annualrent ought to be paid in this caſe.

'The Lords altered the Lord Ordinary's interlocutor, and found no 'intereſt due.'

A. E.

For Malcolm, *Ilay Campbell.* For Creditors, *D. Armſtrong.*

No. XIII. *July* 14. 1768.

ARCHIBALD SINCLAIR of the Iſland of Jamaica, and WILLIAM SUTHERLAND his Attorney;

Againſt

Mrs FRAZER and her Huſband, ALEXANDER FRAZER younger of Strichen, Eſquire.

FOREIGN.

MRS FRAZER having ſucceeded, when under age, to an eſtate in Jamaica, her tutors appointed Archibald Sinclair, and one Mr Archdeacon, attornies for managing it. Mr Sinclair, however, alone acted.

When Mrs Frazer came of age, another gentleman was appointed in Mr Sinclair's place; but no ſettlement of accompts appears to have been made with Mr Sinclair.

The eſtate was ſold in 1763; and, in 1767, Mr Sinclair brought an action in this court againſt Mrs Frazer for a ſpecific ſum, awarded by a judgment of the ſupreme court of judicature in the iſland of Jamaica, as a balance due the purſuer upon an accompt-current with the defender. The record produced was certified by the clerk of court; his ſubſcription by the ſecretary of the iſland, a notary-public; and the ſecretary's ſubſcription was confirmed by that of the governor; and the great ſeal of the iſland was appended.

The defender made ſome objections to the contents of the decreet in point of form; but, when the cauſe went to the houſe of peers, they were conſidered as ariſing intirely from unacquaintance with the nature of the Engliſh proceſs.

An objection, however, of another ſort was offered, viz. That the compearance made for the defender in Jamaica was not with her knowledge or authority. She therefore argued, that the decree was to be conſidered as a decree in abſence, and ought to be opened up in courſe, as decrees of abſence uſually are, when the grounds of them are queſtioned: And ſhe accordingly craved, that the purſuer ſhould produce the vouchers

vouchers of the debts he claimed, in order to introduce a fair compt and reckoning between the parties.

'The Lord Ordinary ordered the vouchers to be produced.'

The purſuer reclaimed to the inner-houſe, and *argued*, 1*mo*, That the decreet of a ſupreme court was to be held *pro veritate*; ſo that, if the decreet he produced was not diſputed to be, in fact, the decreet of a tribunal, over which the courts in Scotland had no juriſdiction, it was as incompetent for them to examine into the grounds of deciſion, as to open up a judgment, *in foro*, of their own. 2*do*, That, if the decreet is not to be acknowledged as a *res judicata*, it ought, at leaſt, to throw the *onus probandi* upon thoſe who object to it.

He particularly urged, that decrees of foreign courts of juſtice were every where put in execution *ex comitate*; but that, in a caſe like the preſent, where the decreet was pronounced by a Britiſh court, there was even a neceſſity to give it effect; ſince, otherwiſe, the commerce and due connection between the different parts of the empire could not be preſerved.

The authorities the purſuer founded on were, *Voet de re judicata*, § 41.; *Huber in rat. ad leg.* 75. *De Jud.*; *Mynſingen obſervat. cent. obſ.* 69.; Juſtice on the laws of the ſea, p. 427.; 1. Rolls ab. 929.; *Molloy de jure maritimo*, *l.* 3. *cap.* 8. § 8.——Deciſions, Edwards againſt Preſcot, 29. December 1720; Wedderburn againſt Keith, in 1760; and Laycock againſt Clark, p. 113. of this volume. He likewiſe ſet forth, that decrees of the court of ſeſſion were received in the court of chancery in England, and execution decreed upon them. It does not appear from the appeal caſes, out of which alone this report is collected, that any authorities were quoted by the defenders.

'The Lords unanimouſly adhered to the Lord Ordinary's interlo-
'cutor.'

This determination was reverſed in the houſe of peers; and the principle of the deciſion is given in the judgment.

No. CXIV. *November* 24. 1769.

ARCHIBALD EDMONSTONE of Duntreath, Eſq;

Againſt

CAMPBELL EDMONSTONE, Eſq; and others.

TAILZIE.

THE late Archibald Edmonſtone became bound, in his contract of marriage, to ſettle his Scots eſtates on the heirs-male of the marriage. Several years afterwards, he executed a ſtrict entail of theſe eſtates, without the concurrence of his eldeſt ſon. In this deed, he diſponed his lands 'to Archibald Edmonſtone his eldeſt lawful ſon, and 'the heirs-male of his body; whom failing, to Campbell Edmonſtone 'his ſecond ſon, and the heirs-male of his body; whom failing, to 'Charles Edmonſtone his third ſon,' &c. He reſerved his own liferent, with power to alter, *etiam in articulo mortis.* He then provides, that 'the ſaid *Archibald Edmonſtone, and the other heirs of entail above na-* '*med,*' ſhall diſcharge his debts, &c. and the proviſions to his younger children.

The entail goes on to declare, 'That it ſhall not be lawful, nor in 'the power of any of the heirs of tailzie and proviſion above named,' to alter the order of ſucceſſion, contract debt, &c. And then it provides, 'That it ſhall be lawful to, and in the power of the ſaid heirs of tail-'zie, to burden and affect the ſaid eſtate with the ſum of 40,000 'merks, Scots money, which I the ſaid Archibald Edmonſtone do here-'by provide and ordain my heir of tailzie to pay my younger children 'unprovided,' &c.

It then orders, that all adjudications on debts which ſhall be contracted by the entailer, or '*by the foreſaid heirs and members of tailzie,*' ſhall be redeemed, &c. 'And that the ſaid Archibald Edmonſtone, *or* 'the firſt heir who ſhall ſucceed,' ſhall cauſe regiſter the entail, &c.

The precept to infeft, is, 'to ſeiſe the ſaid Archibald Edmonſtone, 'and heir above named; whom failing, the other heirs of tailzie and 'proviſion above mentioned,' &c. The warrandice and the aſſignation of the mails and duties is 'to Archibald Edmonſtone, and the other 'heirs of entail.' The deed was properly recorded.

On the entailer's death in 1768, Archibald Edmonſtone brought a declarator againſt his brother, and the other ſubſtitutes in the entail, to have it found, that he, as diſponee and compleat fiar, was not ſubject to any of its limitations or reſtrictions.

The argument for the defenders amounted to this: The powers of the entailer to bind the purſuer are indiſputable; and both the general im-

import of the ſettlement, and the particular expreſſions uſed, prove, that it was his intention to ſubject him to the ſame fetters with the remoter heirs. The ſeveral limitations to the purſuer and his brother, are declared to be 'always with, and under the burden of the proviſions, conditions, &c. after expreſſed;' and the mode of expreſſion, 'Archibald Edmonſtone, or other heirs of tailzie,' ſo often repeated, demonſtrates, that the purſuer was conſidered in no other light than firſt heir of tailzie. The clauſe reſpecting the proviſion to the younger children, was particularly urged in this view.

As to the deciſions quoted for the purſuer, it was obſerved, that the caſe of Leſlie of Findraſſie, 24th July 1752, turned on a deed nearly unintelligible, and a deed where the inſtitute was never coupled with the other heirs of entail; and that, in the caſe of Balfour of Randieſton, 14th February 1758, the queſtion was with onerous creditors, and not among donees, between whom the will of the common donor is the only rule of deciſion. Then the caſe of Gordon of Pitlurg, July 1. 1761, was ſtated as an authority for the defenders.

On the other ſide, the purſuer argued, that the ſtatute authoriſing ſtrict entails, ſupports only reſtraints laid on the heirs of tailzie, not on perſons veſted with the whole fee: That the fiar poſſeſſes the full exerciſe of property; and that no ſort of reſtriction of his powers will be received at common law, without the cleareſt intention of the donor ſignified in the moſt preciſe terms, applying directly to the diſponee, without there being a poſſibility of doubt: That prohibitory, irritant, and reſolutive clauſes, owe their authority to poſitive ſtatute, and not to common law. By not only limiting the rights of the proprietor, but expoſing him to an entire forfeiture of them; by excluding the juſt claims of onerous creditors; and, by checking the improvement of the country in throwing lands *extra commercium*, they are not only in the ſituation of ordinary reſtraints on the fiar, (requiring clear evidence of intention to conſtitute them, and admitting only of ſtrict interpretation when conſtituted,) but they are held to be *ſtrictiſſimi juris*. The intention of the donor muſt not only be indubitable, but the reſtrictions will be of no avail, unleſs that meaning is expreſſed in the proper place, (not gathered from particular expreſſions, nor from the general ſcope of the deed), and in legal technical language. That it was true, even in entails, the will of the donor was, in ſome caſes, to receive a liberal interpretation; but theſe were only where the matter directed was attributed to the abſolute diſpoſal of will by the common law. Thus, in a queſtion, which of two claimants ſhould take the ſucceſſion, a liberal interpretation of the will of the entailer would very properly direct the determination.

The deſtination to the purſuer in the entailer's marriage-contract, was mentioned as an argument, to ſhow, that there could not, *in bona fide*, have been any intention to fetter him; and the omiſſion of his name in the reſtraining clauſes, was urged to prove, that this muſt have actually been the caſe. The deciſions of Hepburn of Keith and Sinclair of Carlowrie were quoted, as aſcertaining the diſtinctions in conſtruing entails which the purſuer contended for; and thoſe of Leſlie and Balfour were urged as directly in point, ſince there could be no doubt of the intention of the entailer, in both theſe caſes, to impoſe the reſtraints on the diſponee;

diſponee; and yet that intention was diſregarded. As to the objection, that the caſe of Balfour was decided on a queſtion with creditors, it was obſerved, that this circumſtance made no difference in point of law, ſince it was only in right of the diſponee that the creditors could claim; and, in all caſes like the preſent, the favour due to creditors muſt operate againſt entails as much as if creditors were actually litigating. The interlocutor of the court was as follows:

'The Lords find, that, in reſpect it appears from ſeveral clauſes in 'the entail executed by the purſuer's father, that the purſuer is 'comprehended under the deſcription and deſignation of Heir of 'Entail, he is thereby ſubjected to the limitations and reſtrictions 'of the ſaid entail; and therefore ſuſtain the defences, and aſſoilzie, 'and decern.'

Reverſed on appeal.

N. B. The account of this deciſion is taken only from the appeal caſes.

NOTE

NOTE of CASES Appealed.

Page 221. Sir Thomas Burnet againſt Burnets.

April 30. 1766.

ORDERED and adjudged, That the appeal be diſmiſſed, and that the interlocutor complained of be affirmed. And it is farther ordered, that the appellant do pay to the reſpondent L. 80 coſts, in reſpect of the ſaid appeal.

Page 207. Rannie, &c. againſt Pringle.

January 29. 1767.

ORDERED and adjudged, That ſo much of the interlocutor of the 25th February 1765, as ſuſtains the reaſons of reduction of the heritable bond for L. 1000 Sterling, granted by Mark Pringle deceaſed, to Mark Pringle his youngeſt ſon, as being granted on deathbed; as alſo, of the firſt codicile in queſtion ſubjoined to the laſt will of the ſaid deceaſed Mark Pringle, as being a deed of a teſtamentary nature, be, and the ſame is hereby reverſed.

Page 267. Baird and others, creditors, of Primroſe, againſt Neil Earl of Roſeberry.

April 3. 1767.

ORDERED and adjudged, That the appeal be diſmiſſed this houſe, and the interlocutors therein complained of be hereby affirmed.

Page 260. Earl and Lady Fife againſt Sir John Sinclair.

April 6. 1767.

ORDERED and adjudged, That the appeal be diſmiſſed, and the interlocutors complained of be affirmed.

Page 98. Peters againſt Spiers.

December 18. 1767.

ORDERED and adjudged, That the appeal be diſmiſſed this houſe, and the interlocutors therein complained of be hereby affirmed.

Page 126. Douglas of Bridgeton againſt Reid of Logie.

February 23. 1768.

IT appearing to this houſe, that the retour of the ſervices of Thomas Stormonth to his father Alexander Stormonth, was in the cu-

ſtody of the ſheriff-clerk, and clerk to the meeting of freeholders, in the morning of the day of the meeting; that it was then caſually loſt; that an extract could not be got of the retour during the ſitting of the meeting; and, that an extract of the retour was produced to the court of ſeſſion, and appeared to be truly recited in the conveyance to the appellant. Ordered and adjudged, That the interlocutors therein complained of be hereby reverſed.

Page 66. Baillie againſt Tennant.

March 26. 1770.

ORDERED and adjudged, That the interlocutors complained of be reverſed; and it is declared, that John Chatto is preferable, and intitled to be ſerved heir of proviſion to the deceaſed Mr William Walker, under the ſettlement made by him of his eſtate of Stonypath in 1752. And it is further ordered, That the objection to the ſervice of the ſaid John Chatto be repelled, and the mutual declarators be conjoined, and the ſaid John Chatto aſſoilzied from the proceſs of declarator at the inſtance of the ſaid William Baillie; and that the court of ſeſſion do find, in terms of the declarator at the inſtance of Agnes Tennant, mother of the ſaid John Chatto, againſt the ſaid William Baillie. And it is further ordered, That the ſaid court of ſeſſion do give all neceſſary and proper directions for carrying this judgment into execution.

Page 189. Macdonalds againſt Butler.

April 4. 1770.

ORDERED and adjudged, That the appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed.

Page 194 and 198. M'Kinnon againſt Sir James Macdonald.

February 25. 1771.

ORDERED and adjudged, That the appeal be diſmiſſed, and that the interlocutors therein complained of be, and the ſame are hereby affirmed.

Page 384. Sinclair againſt Frazer.

March 4. 1771.

IT is declared, that the judgment of the ſupreme court of Jamaica ought to be received as evidence, *prima facie*, of the debt; and that it lies upon the defendant to impeach the juſtice thereof, or to ſhow the ſame to have been irregularly obtained. It is therefore ordered and adjudged, That the ſeveral interlocutors complained of be, and the ſame are hereby reverſed.

Page 386. Edmonſtone againſt Edmonſtone.

April 15. 1771.

ORDERED and adjudged, That the interlocutors complained of be hereby reverſed. And it is hereby declared, That the appellant being fiar, or diſponee, and not an heir of tailzie, ought not, by implication from other parts of the deed of entail, to be conſtrued within the prohibitory, irritant, and reſolutive clauſes laid only upon the heirs of tailzie.

Page 185. Lord Halkerton againſt Scott.

February 3. 1772.

ORDERED and adjudged, That the ſeveral interlocutors complained of in the original and croſs appeals be affirmed, with the following variations, viz. in the interlocutor of the 4th July 1769, complained of by the croſs apppeal, after the words, 'take the ſame out from 'the cruives,' to leave out the words, 'in fiſhing time;' and, inſtead thereof, to inſert the words, 'in times of flood;' and, after the words, 'but that it is ſufficient,' to inſert the words, 'at ſuch times.' And it is further ordered, That the appellant in the original appeal do pay to the reſpondents in ſaid appeal L. 100 for their coſts.

Page 154. and 199. Steel (William Wilſon) againſt Earl of Home.

April 9. 1772.

ORDERED and adjudged, That the original and croſs appeals be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed.

Page 351. Campbell againſt Haſtie.

April 14. 1772.

ORDERED and adjudged, That the interlocutors complained of be reverſed.

Page 170. Cheap and others againſt Aiton and Co.

December 11. 1772.

ORDERED and adjudged, That the foreſaid interlocutors of the 4th Auguſt 1768, and ſo much of the ſubſequent interlocutors as adhere to the ſame be, and the ſame are hereby reverſed; and, that the whole other interlocutors, as well of the Lord Ordinary as of the whole Lords of ſeſſion, in ſo far as reſpects the other points in this cauſe be, and the ſame are hereby affirmed; reſerving to the reſpondents, the ſaid Aiton and Co. their relief and all claims and demands competent to them from, or out of the eſtate of Charles Adair, in the ſaid petition of appeal mentioned.

Page 313. Livingſton againſt Warrock.

April 29. 1773.

ORDERED and adjudged, That the appeal be diſmiſſed, and that the interlocutor therein complained of be affirmed.

Page 147. Coltart againſt Frazer.

January 28. 1774.

ORDERED and adjudged, That the appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed.

Page 134. Duke of Roxburgh againſt the Earls of Home and Tankerville.

June 6. 1774.

ORDERED and adjudged, That the interlocutors complained of be reverſed, and that the cauſe be remitted back to the court of ſeſſion in Scotland, to give the proper directions for carrying this judgement into execution.

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ACT of GRACE. *Vide* Priſoner. Page 129.

ACTIO QUANTI MINORIS. The purchaſer of a houſe at a judicial ſale, is not intitled to retain from the price the premium due to the Edinburgh Inſurance Company, tho' the ſubject had been conditioned to be unburdened of all the deeds of the former proprietor, and the fact of inſurance was unknown. Page 1. *Buchannan* contra *Jamieſon. January* 16. 1765.

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N. B. This laſt determination was diſapproved of by the court, and the ſpirit of it departed from in a caſe from Bremen, ſummer ſeſſion 1776.

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